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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1937

THE UNITED STATES OF AMERICA, *Appellant,* vs. MILO W. BEKINS and REED J. BEKINS, as Trustees Appointed by the Will of Martin Bekins, Deceased, et al., *Appellees.*	No. 757
LINDSAY-STRATHMORE IRRIGATION DISTRICT, *Appellant,* vs. MILO W. BEKINS and REED J. BEKINS, as Trustees Appointed by the Will of Martin Bekins, Deceased, et al., *Appellees.*	No. 772

Appeals from the District Court of the United States for the Southern District of California.

BRIEF FOR APPELLEES.

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*Due to the fact that the printed record has not been received by counsel and cannot be received in time to permit the filing of this brief seven days before the case is called for hearing, as required by the rules of this court, it is impossible to refer to the record. Permission to insert the page references after the brief is filed is requested. Only the galley proofs of the brief of United States have been received so that reference to page is impossible.

STATEMENT OF THE CASE.

Appellees are the owners of bonds of the Lindsay-Strathmore Irrigation District in the amount of one hundred fifty-six thousand ($156,000.00) together with unpaid interest coupons from July 1, 1933, and interest upon the matured portion from the several dates of presentation to the district treasurer as provided in Section 52 of "the California Irrigation District Act". (Appendix.)

Prior to the filing of the petition in this cause the appellees on August 31, 1937, applied (R. 40...) to the Superior Court of the State of California in and for the County of Tulare for a writ of mandate to require the Supervisors of the County of Tulare to levy assessments upon the lands within the appellant district as required by Section 39 of the California Irrigation District Act (Appendix) to pay in full the matured claims of the petitioners in said cause (appellees here) amounting to ninety thousand five hundred ($90,500.00) dollars principal and interest coupons amounting to thirty-one thousand four hundred ninety-eight ($31,498.00) dollars, which matured during the years 1933 to 1937 inclusive, representing that the board of directors of appellant district had failed during the years 1933, 1934, 1935 and 1936 to levy assessments sufficient for that purpose.

On August 31, 1937, the Superior Judge issued an alternative writ of mandate returnable September 13, 1937, requiring the Supervisors of Tulare County to prepare an assessment roll and levy the assessment as prayed for and as directed by Section 39b of the California Irrigation District Act. (Appendix.)

During the pendency of these proceedings and before final determination the U. S. District Judge on September 22, 1937, issued in the instant cause an "Order To Show Cause Why Injunction Should Not Issue And Why Interlocutory Decree Making Plan Temporarily Operative Should Not Be Entered" (R. 19) enjoining the appellees from further prosecution of its writ pending determination thereof by the district judge.

A "Return Of Certain Creditors Showing Cause Why An Injunction Should Not Issue And Why An Interlocutory Decree Making Plan Temporarily Operative Should Not Be Entered", was made by appellees thereto at the same time that the motion to dismiss was made. This return was made not only upon the grounds of the unconstitutionality of Chapter X, but upon the following additional grounds:

(a) The injunction would interfere with the political and governmental powers of appellant district.

(b) The insufficiency of the petition in bankruptcy.

(c) The injunction would interfere with vested rights of the respondents and violate subsection C of Section 83, of the Bankruptcy Act: (See Appendix to brief of the United States.)

(d) Because the obligations represented by appellees' bonds are obligations of the State of California payable through political and governmental procedure of the state effected through the Board of Supervisors.

At the time of the hearing appellees filed with the court as part of their proof of want of jurisdiction a certified copy of a "Judgment of Dismissal" entered in cause No. 4005. "In the Matter of Lindsay-Strathmore Irrigation District, an insolvent Taxing District" (R. 69.), entered July 26, 1937, under Section 80 pursuant to the decision in *Bekins v. Lindsay-Strathmore Irr. Dist.*, 88 Fed. (2d) 1004.

Upon the return, the order to show cause and temporary injunction was quashed by the district judge (R. 89.) and an appeal is here taken therefrom.

The motion to dismiss in addition to the constitutional questions, specified that the petition in bankruptcy (R. 22. and 24.) was insufficient factually to give jurisdiction to the District Court because:

(a) Petitioner does not affirmatively appear to be insolvent or unable to pay its debts as they mature. Not only is there an absence of showing of insolvency, this being partly a question of law, since as hereinafter showed the state is the owner of all the property of the district, but indeed the petition affirmatively shows that the district is able to pay its debts as they mature for inasmuch as the district alleges that it did "in the year 1933, and in all years subsequent thereto apply to and obtain from the California District Securities Commission" the relief provided by Section 11. (Appendix.) Thereby the board of directors may annually determine with the approval of the commission the assessment which it will be reasonably possible for the lands in the district to pay.

(b) The petition shows upon its face that the Reconstruction Finance Corporation has made a loan to the district under Title 43, Section 403 U. S. C. which statute authorizes only loans to reduce or refinance irrigation district indebtedness. The Reconstruction Finance Corporation may make such loans only if satisfied that the district debt or a major portion thereof, will be reduced or refinanced. Having made the loan it has so determined; the Reconstruction Finance Corporation is not and can not acquire the bonds at their full face value; and the debt represented by the loan therefore is not affected by the plan.

THE ACT OF CONGRESS.

Chapter X of the Bankruptcy Act was approved August 16, 1937. It adds Sections 81 to 84 to the Act and was passed after Chapter IX which was Sections 78 to 80 of the same Act, was held unconstitutional by this court in the *Ashton* case, hereinafter referred to.

There seem to be two primary purposes sought by Chapter X: First: to indicate, if that may be done, that an irrigation district and similar organizations are not governmental agents, and Secondly, to indicate by legislative direction, that in those cases where Reconstruction Finance Corporation has loaned money to a district and holds, in some capacity, a portion of the old securities of that district, that it is or may be deemed a creditor of the district to the

extent of the full face amount of such securities as it may hold.

On the first point it appears that there is no difference in the fundamental principles of the two acts. The most material changes being:

(1) The new act does not make the consent of the state a requisite, and

(2) It attempts to classify the several public agencies included as, "taxing agencies or instrumentalities" rather than "political subdivision".

The second change seems to be designed to enable districts that have already refinanced their indebtedness through loans from Reconstruction Finance Corporation to take advantage of the Act to force the minority bondholders to accept the plan adopted. For this purpose, Reconstruction Finance Corporation is to be regarded as the owner of the securities which it may have taken up by the loan, and thus be deemed affected by the plan.

It is to be doubted that this second purpose or change has been or can be accomplished.

Reconstruction Finance Corporation is authorized by the act which gave it life (Section 403, Title 43, U. S. C.), and which constitutes the charter of the corporation to loan money to an irrigation district to reduce or refinance the debt of the district and only where the corporation is satisfied that an agreement has been made between the district and the holders of its bonds, or other evidences of debt under which the district will be able to purchase or refund all or a

jor portion of such bonds, or evidence of debt. The igation to the Reconstruction Finance Corporation ıld not seem to be affected by the plan, as a matter law.

Further Section 83 (a) provides that the peti- ıer can file its petition under the act if it is in- vent or unable to meet its debts as they mature. If district has already refinanced through a loan m Reconstruction Finance Corporation it would m that the district is not insolvent or unable to pay debts as they mature; unless the new obligation Reconstruction Finance Corporation (not the old) more than the district can pay.

Creditors owning 51% of the securities affected by plan must have accepted it in writing. If Recon- uction Finance Corporation is not affected by the n, then under the act, the Reconstruction Finance rporation would hardly be in a position to con- bute to that percentage of acceptances.

The act provides further (not materially different om Chapter IX) for an injunction against prosecut- certain suits. It also provides that this cannot be ıe where rights have become vested. (The return ows (R. 26...) that appellees' bonds and coupons l been presented and under the provisions of Sec- n 52 of the California Irrigation District Act (Ap- ndix); had obtained a fixed status. That being so injunction would have issued, regardless of the stitutionality of the act, and the court's order ashing the order to show cause and denying the unction would be sustained.)

BRIEF ANALYSIS OF THE CALIFORNIA IRRIGATION DISTRICT ACT AND RELATED LAWS.

The Wright Act was passed by California in 1887 and with minor changes remained until 1897, when it was rewritten as an entirely new law, which has since been known as "the California Irrigation District Act", Statutes 1897, page 254, as amended. Important parts of this act and related laws are set forth in the appendix.

To form a district, a petition is presented to the board of supervisors of the county by the landowners or electors residing in the proposed district. The supervisors, after hearing, forward a copy of the petition to the State Engineer, who determines the feasibility of the undertaking. After receiving his findings, the board of supervisors is authorized to conduct a hearing to determine the genuineness and sufficiency of the petition and other matters and to call an election of the qualified electors on the proposition.

The board of directors of the district is elected at popular election by qualified electors. The assessor, collector and treasurer are also independent elective officers. A director must be an elector and freeholder of the district. All officers are required to execute official bonds for the faithful performance of their duties, running in favor of the state.

Section 29 of the act provides that "the legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district and shall be held by such

district in trust for, and is hereby dedicated and set apart to the uses and purposes set forth in this act".

The directors may cause bonds to be issued and sold for the purpose of constructing or purchasing necessary irrigation canals, works, and the like. The matter must first, however, be submitted to the California Irrigation District Securities Commission, a state fiscal agency, for its approval. After approval of the commission an election is called and held upon the question.

Section 33 of the district act provides that the bonds and the interest thereon shall be paid from revenue derived from an annual assessment upon the lands within the district "and all the land within the district shall be and remain liable to be assessed for such payments".

Section 35 provides that the assessor must assess all the lands in the district, including city and town lots, "at its full cash value". Under this section all the lots and other lands in entire cities within irrigation districts are assessed for the bonds of the districts, although they receive perhaps no irrigation water. The assessments are equalized by the board of directors, sitting as a board of equalization.

Section 39 provides that the board of directors shall annually levy an assessment upon the lands within the district an amount sufficient to raise, among other purposes, the interest due or that will become due on all outstanding bonds of the district during the next calendar year; also sufficient to pay the principal of

all bonds of the district that have matured or that will mature in the course of the next ensuing calendar year.

Section 39b provides that

> "If as the result of the neglect or refusal of the board of directors to cause such assessment and levies to be made as in this act provided, then the duly equalized assessment made by the county assessor of the county * * * shall be the basis of assessment for the district, and the board of supervisors of the county in which the office of the board of directors of said district is situated shall cause an assessment roll of said district to be prepared, and shall make the levy required by this act."

And this section further provides for the carrying out of the other functions in relation to the collection of the assessments by the county officers in event of default of the district officials.

Section 39c provides that the district attorney of the county shall see that these duties are performed, and upon his default the duty is cast upon the Attorney General of the State. This duty has been affirmed by the courts. *(Selby v. Oakdale Irrigation District,* 140 Cal. App. 171.)

Other sections of the act provide for the collection of the assessments and for sales of lands upon defaults.

Under Section 45 a certificate of sale is issued upon the sale for delinquent assessments.

Section 47 provides that a redemption of property sold may be made within three years upon payment of the amount of the assessment with costs and penalties.

Section 48 provides for the issuance of a deed which provides that the deed conveys to the grantee the absolute title to the lands described free of all encumbrances.

It has been held that the liens of an irrigation district assessment and the liens for state, county, and city taxes are upon a parity. (*Le Mesa, etc. Irrigation District v. Hornbeck,* 216 Cal. 730.)

Section 52 of the act provides that "Upon presentation of any matured bond of the district, the treasurer shall pay the same from the bond principal fund, and upon presentation of any matured interest coupon of any bond of the district, the treasurer shall pay the same from the bond interest fund. If money is not available in the fund designated for the payment of any such matured bond or interest coupon, it shall draw interest at the rate of seven per cent per annum from the date of its presentation for payment until notice is given that funds are available for its payment, and it shall be stamped and provision made for its payment as in the case of a warrant for the payment of which funds are not available on its presentation * * *."

DISSOLUTION OF IRRIGATION DISTRICTS.

Statutes 1903, page 3, provide for the voluntary dissolution of irrigation districts, and Statutes 1919, page 751, provide for the involuntary dissolution of irrigation districts.

Section 3 of this latter act provides that upon final judgment of dissolution the appropriate county officers shall act as ex officio officers of the district. The records belonging to the district shall be turned over to the proper county officers. "The county treasurer shall perform the duties of the district treasurer; the county tax collector shall perform the duties of the district tax collector; the county assessor shall perform the duties of the district assessor; the county clerk shall perform the duties of the secretary of the board of directors; the board of supervisors shall perform the duties of the board of directors; they shall proceed to levy and collect such additional taxes as may be necessary upon the lands embraced within such district in the same manner and with the same procedure for non-payment that county taxes are levied and collected for the purpose of paying such outstanding indebtedness not provided for by previous assessments. All property of every kind belonging to the district, including lands sold to the district for taxes, shall be sold as the court may direct and the proceeds together with all money on hand shall be used to pay off the indebtedness. All funds remaining after all outstanding indebtedness has been paid shall be apportioned and be paid to the assessment payers according to the last assessment roll."

THE DISTRICTS SECURITIES COMMISSION.

This commission consists of the attorney general, state engineer, superintendent of banks, and two others appointed by the Governor. It has some fiscal supervision over the affairs of the irrigation districts. This supervision is provided by Sections 30 to 32e of the California Irrigation District Act and by the provisions of the California Districts Securities Commission Act. (See Appendix.) These acts provide that the district must submit its plans to the Commission before the issuance of bonds, and for approval by the commission, including approval for the purpose of entitling the bonds to be certified by the State Controller as lawful investment for banks, trust funds, insurance companies, state school funds, and other like purposes.

Section 11 of this act provides that whenever any district has levied the annual assessment required and is in default on its bond obligations 20% or more, the district may become subject to the section and to the control of the commission, and thereafter continue subject to such control until it has gone out of default. Providing, further, that the "board of directors of such defaulting district, in levying the annual assessment of the district, may, notwithstanding Section 39 of the California Irrigation District Act or any other provision of law governing such district, levy only for such total amount as in their judgment by a finding of fact, approved by the commission it will be reasonably possible for the lands in said district, taken as a whole, to pay without exceeding a delinquency of fifteen per cent. In determining the amount

it is possible for the lands to pay, at the time of each annual assessment, the board of directors shall consider the productivity of lands in the district, crops growing and to be grown during the year, market conditions, as well as they can be forecast, the cost of producing and marketing crops, and obligations of the land respecting taxes and public liens".

SUMMARY OF ARGUMENT.

Point A:

The bankruptcy power of Congress does not extend to the states or to their governmental instrumentalities under Sec. 8, Art. 1 C. 4 of the Constitution.

1. A California irrigation district is a state governmental instrumentality performing essential governmental functions and is thus a governmental agent of the state and partakes of the sovereignty of the state. As such it lies as far beyond the bankruptcy power of Congress as does the state itself.

2. Since the bankruptcy clause is framed in general language it falls squarely within the rule that general statutory language does not apply to the sovereign to its disadvantage and thus the state and its agencies are presumed to be exempt from the bankruptcy power.

3. The federal tax clause of the Constitution is in the same section as the bankruptcy clause. They are both stated in general language. It is settled that the United States is prohibited by necessary implication from taxing the state and its governmental

agencies and instrumentalities because a tax would tend to injure and possibly destroy the state. Since a bankruptcy act applied to the state or its agents would tend to injure and if carried to an extreme could destroy the state, the same rule of construction applied to the bankruptcy power must necessarily result in its denial.

4. The new Chapter X of the Bankruptcy Act seems even more vulnerable to constitutional objections than was Chapter IX; primarily in that Chapter X purports to authorize the taxing agency to avail itself of the act without the consent or even over the objection of the parent state.

5. In any event, Chapter X does not seem to have met the main constitutional objections that were made to Chapter IX and unless *Ashton v. Cameron County Water Improvement District No. 1* is to be overruled it seems that *this* act must be held to be without the power of Congress. Since the *Ashton* case was well considered and has, in effect, been followed, it is not supposed that it will be overruled.

Point B:

The bankruptcy power is subject to the Fifth Amendment.

Point C:

Even if the act were constitutional the court in this proceeding did not have jurisdiction, under the allegations of the petition.

Point D:

The cause is *res judicata*.

ARGUMENT.

POINT A. THE BANKRUPTCY POWER OF CONGRESS DOES NOT EXTEND TO THE STATES OR TO THEIR GOVERNMENTAL INSTRUMENTALITIES.

Sections 81 to 84 of the Bankruptcy Act, as added by the Act of Congress August 16, 1937, are not authorized by clause 4, Section 8, Article I of the Constitution, and are prohibited by the Tenth Amendment, and by the inherent nature of dual sovereignty.

1. A CALIFORNIA IRRIGATION DISTRICT IS A STATE GOVERNMENTAL INSTRUMENTALITY PERFORMING ESSENTIAL GOVERNMENTAL FUNCTIONS.

Article XIV, Section 1, California Constitution, provides that "the use of all water * * * is hereby declared to be a public use, and subject to the regulation and control of the state."

Section 3 of the same Article declares, "It is hereby declared that because of the conditions prevailing in this state, the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable."

Article XI, Section 13, of the California Constitution provides:

> "The Legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal function whatever, except that the Legislature shall have power to provide for the supervision, regulation

> and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this State."

By the provisions of Statutes 1911, page 1407, of the State of California, "irrigation in the State of California is hereby declared to be a public necessity and public use, and the power of eminent domain may be exercised on behalf of such public use."

Stats. 1937, Chapter 24. As late as 1937 the legislature of California in an act somewhat like Chapter X here under consideration made a legislative declaration of the nature of an irrigation in the following words:

> Sec. 1. "That such inevitable and wholesale conditions of default will destroy the ability of such districts (irrigation) to pay their bonded debts in whole or in part *and to carry out the necessary public functions with which they are entrusted as governmental agencies of the state.*"

(a) Political and governmental features of the district.

The political and governmental features of the district are further shown by the method of organization and government. The petitioners must be landowners or electors; the *supervisors* and the *state engineer* must pass upon it, and it must be finally accepted by vote of the *electors*. Furthermore, the officers of the district are elected by the electors; they each execute an oath of office, give a bond to the state, and are subject to recall as other elective officers. The district has the power of taxation, the power to issue bonds and

borrow money, and the power of eminent domain. The bonds of the district are to be approved by a state commission. The property of the district is, in effect, the property of the state and is exempt from taxation by other municipal agencies. Its officers are public officers, and its affairs are under the control of the Legislature. Upon dissolution the duties of its officers are performed by county officers, and in default of the performance of its duties of assessment and collection of taxes, the officers of the county are required to perform them, duties which may be compelled by the district attorney of the county and the attorney general of the state.

In

In Re Madera Irr. District, 92 Cal. 296, 321, the court said:

> "That an irrigation district organized under the act in question becomes a public corporation is evident from an examination of the mode of its organization, the purpose for which it is organized, and the powers conferred upon it. It can be organized only at the instance of the board of supervisors of the county,—the legislative body of one of the constitutional subdivisions of the state; its organization can be affected only upon the vote of the qualified electors within its boundaries; its officers are chosen under the sanction and with the formalities required at all public elections in the state,—the officers of such election being required to act under the sanction of an oath, and being authorized to administer oaths when required, for the purpose of conducting the election; and the officers, when elected, being required to execute official bonds

to the state of California, approved by a judge of the superior court. *The district officers thus become public officers of the state.* When organized, the district can acquire, either by purchase or condemnation, all property necessary for the construction of its works, and may construct thereon canals, and other irrigation improvements, and all the property so acquired is to be held by the district in trust, and is dedicated for the use and purposes set forth in the act, and is declared to be a public use, subject to the regulation and control of the state. For the purpose of meeting the cost of acquiring this property, the district is authorized, upon the vote of a majority of its electors, to issue its bonds, and these bonds and the interest thereon are to be paid by revenues derived under the power of taxation, and for which all the real property in the district is to be assessed. *Under this power of taxation, —one of the highest attributes of sovereignty,*—the title of the delinquent owner to the real estate assessed, may be divested by sale, * * * *Here are found the essential elements of a public corporation, none of which pertain to a private corporation.* The property held by the corporation is in trust for the public, and subject to the control of the state. Its officers are public officers, chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public. 'Where a corporation is composed exclusively of officers of the government, having no personal interest in it, or with its concerns, and only acting as organs of the state in effecting a great public improvement, it is a public corporation.' (Ang. & A. Corp. Sec. 32.) 'A municipal corporation proper is created mainly

for the interest, advantage, and convenience of the locality of its people. The primary idea is an agency to regulate and administer the interior concerns of the locality in matters peculiar to the place incorporated, and not common to the state or people at large.' (15 Amer. & Eng. Enc. Law, p. 954.) 'Public corporations are such as are created for the discharge of public duties in the administration of civil government.' (Lawson, Rights & Rem. Sec. 332.)" (Italics ours.)

In

Bolton v. Terra Bella Irr. Dist., 106 Cal. App. 313, 316

(hearing by Supreme Court denied), the court stated:

"* * * The county is an agency of the state for performing certain functions of government. The legislature has likewise provided for, and authorized, irrigation districts to carry out another function of government. * * *."

In

Woody v. Security Trust & Savings Bank, 137 Cal. App. 29, 35,

(hearing by Supreme Court denied), the court said:

"* * * An irrigation district possesses governmental functions and is a creature of law which can only be brought into being under the direct authority of the state. * * *"

In

Swampland etc. Dist. No. 341 v. Blumenberg, 156 Cal. 532, 537,

the court said:

"* * * a levy for such purposes, by a district which has completed its permanent system of

ditches, a district, which though not a municipal corporation, is at least a public corporation performing some of the functions of government for the local territory interested, bears a close resemblance to ordinary taxes levied to defray the expenses of a city or county. * * *"

In

Miller & Lux v. Board of Supervisors, 189 Cal. 254, 263,

the court said:

"* * * In the opinion in the Madera District case the irrigation district was treated as a public corporation to be invested with certain political duties to be exercised in behalf of the state. * * *"

In

Fallbrook Irr. District v. Bradley, 164 U. S. 112, 174,

this court said:

"The formation of one of these irrigation districts amounts to the creation of a public corporation, and their officers are public officers. * * *"

In

Meriweather v. Garrett, 102 U. S. 472, 515,

this Court said:

"The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the Legislature upon consideration of policy, necessity, and public welfare. * * * This power to impose burdens and raise money is the highest attribute of sovereignty, * * * Especially is it beyond the power of the federal judiciary to assume the place of a state in the exercise of this authority at once so delicate and so important."

It has been consistently held by this Court from the beginning that these districts created under the elaborate scheme devised for their organization and operation by the Legislature are public agencies for the promotion of a public purpose.

In the case of

Yolo v. Modesto Irr. District, 216 Cal. 274, 276,

the court held the district liable in tort in connection with the sale and delivery of electricity outside the district boundaries, but as to the usual functions of the district the court said that these districts are not generally liable for torts of their agents because they are held to be state agencies performing governmental functions.

In

O'Neill v. Leamer, 239 U. S. 244,

this Court, quoting from the Supreme Court of Nebraska, said:

> In our opinion, it is too late in the day to contend that the irrigation of arid land, the straightening and improvement of water courses, the building of levees, and the drainage of swamp and overflowed lands for the improvement of the health and comfort of the community, and the reclamation of waste places and the promotion of agriculture, are not all and every of them subjects of the general and public concern, the promotion and regulation of which are among the most important of *governmental powers, duties and functions.*

It was stated in

Lane County v. Oregon, 7 Wallace (U. S.) 71:

"Now, to the existence of the States, themselves

necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government."

In

Houck v. Little River Drainage District, 239 U. S. 254, 261,

the then Mr. Justice Hughes, speaking for the Court, said:

"It was constituted a political subdivision of the state for the purpose of performing prescribed functions of government."

In the case of

Brush v. Commissioner of Internal Revenue, 300 U. S. 352, 362,

this Court said:

"For present purposes, however, we shall inquire whether the activity here in question constitutes an essential governmental function within the proper meaning of that term; and in that view decide the case."

Saying further (p. 364):

"* * * our decision in the Indian Motorcycle Co. case did not rest in the slightest degree upon a consideration of the state rule in respect of tort actions, but upon a broad consideration of the implied constitutional immunity arising from the dual character of our national and state governments.

"The rule in respect of municipal liability in tort is a local matter; * * *"

And:

"* * * So long as our present dual form of government endures, the states, it must never be forgotten, 'are as independent of the general government as that government within its sphere is independent of the States.' The Collector v. Day, 11 Wall. 113, 124, 20 L. Ed. 122."

"One of the most striking illustrations of the public interest in the use of water and the governmental power to deal with it is shown in legislation and judicial pronouncement with respect to the arid-land states of the far west. In some of them the State Constitution asserts public ownership of all unappropriated nonnavigable waters. * * * Clark v. Nash, 198 U. S. 361, 25 S. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171. We said that what is a public use may depend upon the facts surrounding the subject; pointed out the vital need of water for irrigation in the arid-land states, a need which did not exist in the states of the east and where, consequently, a different rule obtained; and held that the court must recognize the difference of climate and soil which rendered necessary differing laws in the two groups of states."

In the case of

Union Trust Co. v. State, 154 Cal. 716, 729,

the California Supreme Court said:

"All public corporations exercising governmental functions within a limited portion of the state —counties, cities, towns, reclamation districts, irrigation districts—are agencies of the state, just as the board of works created by this act is such agency."

In the case of

Moody v. Provident Irr. District, 92 C. A. D. 574,

decided March 11, 1937, and which is the latest expression of the California courts upon this subject, Mr. Justice Plummer said:

"It is settled law that an irrigation district is a governmental agency."

2. IT IS A WELL RECOGNIZED PRINCIPLE OF CONSTRUCTION THAT GENERAL STATUTORY LANGUAGE DOES NOT APPLY TO THE SOVEREIGN TO ITS DISADVANTAGE.

In

Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477, 480,

it is said:

"The principle of construction was stated in Mayrhofer v. Board of Education, 89 Cal. 110, to be, 'that the state is not bound by general words in a statute which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it'."

In

City of Pasadena v. Chamberlain, 1 Cal. App. (2d) 125,

the court stated:

"The charter is subject to the rule of legislative interpretation that 'the state *and its agencies* are not bound by general words limiting the rights and interests of its citizens' unless included expressly or by necessary implication. (Kubach v. McGuire, 199 Cal. 215.) * * *". (Italics supplied.)

In

Skelly v. Westminster School Dist., 103 Cal. 652, 656,

the court was considering a mechanic's lien law, and said:

> "The language is general, and in its usual sense would include a schoolhouse, for that is a building and a structure. But it was held that the statute did not apply to public buildings. The rule is that the state is not bound by general words in a statute which would operate to trench upon its sovereign rights, or injuriously affect its capacity to perform its functions or establish a right against it."

In

City of Inglewood v. County of Los Angeles, 207 Cal. 697, 707,

the court said:

> "But it is well settled that the state *and its subordinate agencies, including municipal corporations,* are not bound by general words used in the statute." (Italics ours.)

In

Liebman v. Richmond, 103 Cal. App. 354, 359,

the court said:

> "It is settled law that in the absence of express words to the contrary the state is not included within the general terms of a statute."

This proposition has likewise been well established by the Federal courts.

In the case of

Guarantee Title & Trust Co. v. Title Guaranty and Surety Co., 224 U. S. 152, 155, 56 L. Ed. 706, 708,

the Court was considering a bankruptcy case where it was claimed that the United States was bound as a creditor in a bankruptcy proceeding and where the question here under consideration became involved, the Court reviewed authorities and quoted with approval from

United States v. Herron, 20 Wall. 251, 260, 22 L. Ed. 275, 278,

and said:

> "'The decision was expressly put upon the ground 'that the sovereign authority of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign.' There was much reasoning to sustain the proposition, and it was especially applied to discharges in bankruptcy. Expressing the general assent to the proposition announced, the court said (page 262):
>
> 'Greater unanimity of decision in the courts or of views among text writers can hardly be found upon any important question than exists in respect to this question in the parent country, nor is there any diversity of sentiment in our courts, Federal or State, nor among the text writers of this country.' "

In

United States v. Thompson, 98 U. S. 486, 489, 490, 25 L. Ed. 194, 195,

the court said:

"Limitations derive their authority from statutes. The King was held never to be included, unless expressly named. No laches was imputable to him. These exemptions were founded upon considerations of public policy.

* * * * * * *

When the Colonies achieved their independence, each one took these prerogatives, which had belonged to the Crown; and when the National Constitution was adopted, they were imparted to the new government as incidents of the sovereignty thus created. It is an exception equally applicable to all governments. * * *"

In

Marshall v. New York, 254 U. S. 380, 382, 65 L. Ed. 315, 317,

the Court said:

"At common law the crown of Great Britain, by virtue of a prerogative right, had priority over all subjects for the payment out of a debtor's property of all debts due it. The priority was effective alike whether the property remained in the hands of the debtor, or had been placed in the possession of a third person, or was in custodia legis. * * * The first constitution of the state of New York (adopted in 1777) provided that the common law of England, which, together with the statutes constituted the law of the colony on April 19, 1775, should be and continue the law of the state, subject to such alterations as its legisla-

ture might thereafter make. This provision was embodied, in substance, in the later constitutions. The courts of New York decided that, by virtue of this constitutional provision, the state, as sovereign, succeeded to the crown's prerogative right of priority.

* * * * * * *

This priority arose and exists independently of any statute. The legislature has never, in terms, limited its scope; and the courts have rejected as unsound every contention made that some statute before them for construction had, by implication, effected a repeal or abridgment of the priority.

* * * * * * *

Whether the priority enjoyed by the state of New York is a prerogative right or merely a rule of administration is a matter of local law. Being such, the decisions of the highest court of the state as to the existence of the right and its incidents, will be accepted by this court as conclusive. * * * The priority of the state extends to all property of the debtor within its borders, whether the debtor be a resident or a nonresident, and whether the property be in his possession or in custodia legis. The priority is, therefore, enforceable against the property in the hands of a receiver appointed by a Federal court within the state. * * *"

This rule was recognized in the Colonies and passed on from the Colonies to the new states. As we will see, when a new state is admitted to the Union, it comes into the Union on an equal footing with the original states in all respects. The sovereignty being

reserved to the state, all of the states possess prerogatives of a sovereign, one of which is that the sovereign is not bound by general language which works to his disadvantage. Since a bankruptcy law which would subject the fiscal affairs of the state to an involuntary proceeding would not only be to the disadvantage of the sovereign state, but could actually destroy the independence of the state, it is impossible to conceive that the states, or the people in their sovereign capacity, intended, by the general language of the bankruptcy clause, that the independence of the states should thus be put in jeopardy.

In

Coyle v. Smith, 221 U. S. 559, 567, 55 L. Ed. 853,

the Court said:

> " 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."

In

Buffington v. Day, 11 Wall. 113, 126, 20 L. Ed. 122, 126,

the Court said:

> "We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the state, disables the general government from levying the tax, as that depends upon the express power 'to lay and collect taxes,' *but it shows that*

it is an original inherent power never parted with, and, in respect to which, the supremacy of that government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government stands upon as solid a ground, and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in Dobbins v. Erie Canal Co. (supra), from taxation by the state; *for, in this respect, that is, in respect to the reserved powers, the state is as sovereign and independent as the general government.*" (Italics supplied.)

The *Buffington* case is without doubt the leading authority upon the subject of the right of the United States to tax an agency of the state, and it is interesting to note that the court uses the strong language used in the *Buffington* decision regarding the right of the United States to tax an officer of the state, notwithstanding the constitutional provision: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises * * *." (Art. I, Sec. 8, Cl. 1.)

If Congress has power to apply a bankruptcy statute to an agency or political subdivision of the state, it also has the power to apply a bankruptcy statute to the state itself.

The state itself is a considerable borrower. State bonds are issued for all manner of public purposes. It

is not unusual to find the state capitol constructed with funds borrowed upon a bond issue, and from that purpose down through the long category of state activities. Practically all state demands are paid by warrants or other evidence of indebtedness. If Congress has the power to enact a bankruptcy statute that will apply to an agency of the state—an arm—a department of the state—then there is no doubt but that Congress can likewise enact a bankruptcy statute that will apply to all of the fiscal affairs of the state itself. The fact that Congress has not exercised its full power and might not do so is no derogation of the power itself. If Congress can do what it has attempted to do by Section 81, then it can go all of the way. If it has the power, no one can be heard to complain against the exercise of that power. We maintain that Congress does not have the power, and in the very nature of things could not have the power. The nation, being sovereign in its field, and the state, being sovereign in its field, neither can exercise a power over the other that is not expressly given or reserved to the one attempting to exercise the power, or necessarily implied. The bankruptcy clause, being in general language, it is inconceivable that the independent sovereign state or the people intended that the sovereign could, through a bankruptcy statute, enacted under this general language, be subject to a federal court of bankruptcy and have a receiver in bankruptcy put in charge of the fiscal affairs of the state.

3. THE SAME PRINCIPLES WHICH DECLARE THE BONDS OF STATE INSTRUMENTALITIES TO BE EXEMPT FROM FEDERAL TAXATION MAKE THEM ALSO EXEMPT FROM NATIONAL BANKRUPTCY LEGISLATION.

(a) The origin of the exemption of state and municipal bonds from taxation by the United States.

The Constitution of the United States contains no provision expressly providing that Congress shall have no power to levy taxes upon municipal bonds or the income derived therefrom.

At the close of the American Revolution the thirteen colonies suddenly found themselves to be thirteen sovereign states or nations, all jealous and fearful of each other. The necessities of the situation, however, made cooperation among them for their mutual defense imperative, but they did not conceive themselves to be one nation, and for a time had no intention of uniting to form one nation.

The representatives of no state at the convention, which drafted the Constitution, had the slightest intention of surrendering the sovereignty of their state to any new government, and, yet, it was necessary to vest in the new government the attributes of sovereignty. The result was a compromise. The states delegated to the federal government some of their sovereign powers, but reserved all others to themselves.

The first cases to come before the courts involved attempts upon the part of the states to encroach upon the sovereignty of the federal government. At that time the great danger was that the states would destroy the federal government, by constant en-

croachment upon its delegated powers, and the first case which came before the Supreme Court of the United States, involving the principle under discussion, was *McCulloch v. Maryland,* 4 Wheat. 316, in which a state attempted to impose a tax upon an instrumentality of the Federal Government. In that case Mr. Chief Justice Marshall pointed out that, if the states possessed the power to tax the federal government, or the means or instrumentalities through which it exercised its constitutional powers, the federal government would be subordinated to the states. *He declared the power to tax was the power to destroy,* and that if it were conceded that the states possessed the power to tax the federal government, or its governmental instrumentalities, they could impede, if not destroy, that government.

This principle was first applied to the taxation of bonds in the case of *Weston v. Charleston,* 2 Pet. 449 (January, 1829), in which the Supreme Court of the United States held that an ordinance of the City of Charleston, South Carolina, attempting to tax securities issued by the United States, was unconstitutional. The court held that the bonds represented the exercise of a power vested in the United States by the Constitution.

It is, therefore, a necessary corollary to the decisions in *McCulloch v. Maryland* and *Weston v. Charleston,* that the United States cannot tax the states or its instrumentalities of government. Accordingly we find this Court holding in *Collector v. Day,* 11 Wall. 113, that Congress has no power to

impose a tax upon the salary of a judicial officer of a state; in *United States v. Railroad,* 17 Wall. 322, that the United States cannot levy taxes upon the revenues of a municipal corporation of a state, and in

Mercantile Bank v. New York, 121 U. S. 138, 162,

the Supreme Court said:

> "Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States, * * *"

(b) The income derived from state and municipal bonds is likewise exempt from taxation by the United States.

In

Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 158 U. S. 601,

the Court said:

> "We think the same want of power to tax the property or revenues of the States or their instrumentalities exists in relation to a tax on the income from their securities. * * * it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution."

The decision in *Pollock v. Farmers' Loan & Trust Co.,* resulted in the Sixteenth Amendment. That amendment reads as follows:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

The first case which clearly indicated the court's interpretation was *Evans v. Gore,* 253 U. S. 245.

In *National Life Insurance Co. v. United States,* 277 U. S. 508, it was expressly held that the Revenue Act of 1921, in so far as it attempted to levy a tax upon the income derived from state and municipal bonds, was unconstitutional.

More recently in

Willcuts v. Bunn, 282 U. S. 216,

Mr. Chief Justice Hughes, speaking for the Court, said:

> "And a tax upon the obligations of a State or of its political subdivisions falls within the constitutional prohibition as a tax upon the exercise of the borrowing power of the State."

Mr. Justice Stone, in

Educational Films Corp. v. Ward, 282 U. S. 379,

declared that

> "* * * This court since McCulloch v. Maryland, 4 Wheat. 316, has consistently held that the instrumentalities of either government, or the income derived from them, may not be made the direct object of taxation by the other. * * *"

(c) Regardless of whether the enterprise in which the agency is engaged may be deemed governmental or proprietary, the power to borrow money is a governmental function.

The cases of:

South Carolina v. United States, 199 U. S. 437;
Ohio v. Helvering, 292 U. S. 360;
Helvering v. Powers, 293 U. S. 214,

are none of them cases involving the taxation of state or municipal bonds. The power to tax the properties of an agent employed by a state or the federal government as distinguished from taxation of its operation has long been recognized by the courts. The South Carolina and Ohio cases involved undertakings by the states of enterprises that were then subject to federal taxation. Taxation of enterprises or properties is not the same as taxation of means employed by the state to raise revenues to establish such enterprises. The operation of an enterprise may or may not be an enterprise of a strictly governmental function, but the raising of revenue is the most essential of all governmental functions. Without such power governments could not exist. So in

Farmers & M. Sav. Bank v. Minnesota, 232 U. S. 516, 526,

the Court said:

> "We deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the government, and not in any sense a tax upon the property of the municipality."

When a state creates a public agency of any character, such agency is created for the purpose of con-

ducting business. All its powers are delegated powers of the state.

In

Railroad Co. v. Peniston, 18 Wall. 5, 36,

it was said:

> "It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but on the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. * * * a tax upon their operations is a direct obstruction to the exercise of federal powers."

In

James v. Dravo Contracting Co., ...U. S....., 58 Sup. Ct. Rep. 208, 216, 218, 219, 82 L. Ed. Adv. Op. 125,

Mr. Chief Justice Hughes said, referring to the doctrine of immunity:

> "We said * * * 'the power to tax is no less essential than the power to borrow money'."

And further:

> "That doctrine recognizes the direct effect of a tax which 'would operate on the power to borrow before it is exercised' (Pollock v. Farmers Loan & Trust Co., supra), and which would directly affect the government's obligation as a continuing security. Vital considerations are there involved respecting the permanent rela-

> tions of the government to investors in its securities and *its ability to maintain its credit;* * * * (Italics ours.)

And further:

> "And it was on that principle that 'any taxation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled by the other, exclusively to enable it to perform a governmental function', was prohibited."

See also:

Perry v. United States, 294 U. S. 330;
Ohio Life Ins. Co. v. Debolt, 16 How. 416;
Willcuts v. Bunn, 282 U. S. 216,
Weston v. City Council of Charleston, 2 Peters (U. S.) 449.

The bankruptcy clause of the Constitution conferring upon Congress the power to establish uniform laws on the subject of bankruptcies clearly expresses no greater breadth than the language of the Sixteenth Amendment.

4. THE NEW CHAPTER X OF THE BANKRUPTCY ACT IS EVEN MORE VULNERABLE TO THE CHARGE OF UNCONSTITUTIONALITY THAN WAS THE OLD.

(a) Chapter IX classified irrigation districts as political subdivisions of the state. The new act classifies them to be taxing agencies or instrumentalities.

The difference in attempted classification does not effect any change in the nature and functions of irrigation districts. They are, as shown above, state instrumentalities exercising essential governmental functions.

(b) The old act provided that the petition could be filed if the state consented.

Under the new act apparently the petition can be filed even though the parent state objects.

The new act is thus in that respect an involuntary proceeding in so far as the *parens patriae* is concerned. It is not admitted, however, that state consent would validate the act. It is clear that no act of the state will enlarge the power of Congress.

Both the majority and minority opinions in the case of

Ashton v. Cameron County Water Imp. Dist. No. 1, 298 U. S. 513, 56 Sup. Ct. 892,

admit that Congress does not have the power to impose involuntary bankruptcy upon a state agency.

> "* * * a State may voluntarily consent to be sued; * * * But nothing in this tends to support the view that the federal government, acting under the bankruptcy clause, may impose its will and impair state powers * * *"

Mr. Justice Cardozo, delivering the opinion of the minority, said:

> "The question is not here whether the statute would be valid if it made provision for involuntary bankruptcy, dispensing with the consent of the state and with that of the bankrupt subdivision. For present purposes one may assume that there would be in such conditions a dislocation of that balance between the powers of the states and the powers of the central government which is essential to our federal system. Cf. Hopkins Federal Savings & Loan Assn. v. Cleary,

296 U. S. 315, 56 Sup. Ct. 235, 80 L. Ed. 251; United States v. California, 297 U. S. 175, 56 S. Ct. 421."

"* * * the petition must be accompanied by the written approval of the state, whenever such consent is necessary by virtue of the local law."

5. THE ATTORNEY GENERAL OF THE UNITED STATES, IN HIS OFFICIAL OPINIONS, AGREES THAT BANKRUPTCY CANNOT EXTEND TO A STATE INSTRUMENTALITY.

Honorable Homer Cummings, Attorney General of the United States, in an opinion dated February 4, 1937, being Vol. 38, Op. No. 72, an opinion directed to the Secretary of the Treasury, had under consideration a request for re-consideration of the opinion of the Attorney General dated January 30, 1914, in which the Attorney General had held that special assessment districts lawfully created for public purposes and authorized to exercise a portion of the sovereign powers of the states are "political subdivisions" within the meaning of the Revenue Act of 1913. The occasion for the review was the question whether the sale of gasoline by a producer to an irrigation district in the State of California is subject to excise tax imposed by the Revenue Act of 1932, as amended, and the answer apparently turned upon the question whether the irrigation district is a political subdivision of the state, the act exempting sale of any article "for the exclusive use of the United States, any State, Territory of the United States, or any political subdivisions of the foregoing".

The most important part of this opinion in this connection is that part in which the Attorney General said:

> "It must be observed at the outset that instrumentalities of a state legally employed as a means of executing its sovereign powers are immune from Federal taxation under the constitutional principle recognized since the decision of the United States Supreme Court in McCulloch v. Maryland, 4 Wheat. 316."

Furthermore, in an opinion dated April 21, 1933, furnished to Honorable Hatton W. Sumners, Chairman of the House Judiciary Committee, the Attorney General of the United States in an opinion signed by Charles H. Weston, special assistant, expressed himself in the following manner with relation to the proposed municipal bankruptcy bill (H. R. 3083), which was eventually enacted as Chapter IX of the Bankruptcy Act:

> "Assuming that Congress cannot, even with State consent, enact a bankruptcy law applicable to a State, it does not follow that the power of Congress is equally limited in the case of municipalities. Municipal corporations are of a dual character. They exercise both 'powers which are governmental and powers which are of a private or business character', and in the latter capacity the municipality 'is a mere legal entity or juristic person'."
>
> * * * * * * *
>
> "In my opinion the private or proprietary capacity of a municipality is sufficiently distinct

> and definite to bring it within the purview of the bankruptcy power of Congress where the State, as the representative of the municipality's governmental functions, has given its consent."

(It should here be noted that the Attorney General's opinion is limited to instances in which the state has given its consent.)

The Attorney General then goes on in his opinion to state that he concludes that bankruptcy relief in its nature is not inapplicable to municipalities. Then calls attention to established constitutional principle that the United States and its governmental instrumentalities are free from taxation by the states "and that the States and their governmental instrumentalities are likewise free from taxation by the United States". Citing

> *Indian Motorcycle Co. v. United States,* 283 U. S. 570, 575.

This plan, he holds, is implied from the necessity of maintaining our dual system of government, and says:

> "Congress cannot regulate, directly or indirectly, the fiscal policies of the State or their governmental agencies."

From this also the Attorney General concludes that

> "the authority of a municipality to file a petition under a Federal bankruptcy act must be derived from State law and that the mere fact that the State has not prohibited such action is not sufficient".

The Attorney General further holds that,

> "Neither the United States nor the States may abdicate essential powers of government or delegate them to another sovereign."

Thus it is his conclusion that a state may authorize a municipality to file a bankruptcy petition if it does not interfere with the municipality's governmental functions.

The Attorney General then defines what he means by a municipal corporation as "the body politic and corporate constituted by the incorporation of inhabitants of a city or town for the purposes of local government thereof", and distinguishes such municipal corporation from a public or quasi corporation "the principal purpose of whose creation is as an instrumentality of the State". He then points out that a "public or quasi corporation, such as a county or school or water district, is 'but an instrumentality of the State', incorporated by the State".

The Attorney General points out that powers uniformly differ between municipal corporations and public corporations, on which latter he cites Dillon, Municipal Corporations, 5th Ed., describing them as mere auxiliaries of the state, and says that since many political subdivisions are merely departments or branches of the state government, it seems necessary to express an opinion upon the power of Congress to enact a bankruptcy law applicable to the states themselves, and says that it seems foreign to the conception of bankruptcy to extend its remedies

and the jurisdiction of its courts to a purely governmental body.

> "It was never supposed that the sovereign itself could adjust its own debts through the medium of the bankruptcy court. For the United States to provide such relief for the states would seem, under our dual system of government, equally beyond the scope of bankruptcy legislation. It would, therefore, seem that Congress could bring within the scope of its bankruptcy legislation only private debtors and those other corporate bodies which, although they exercise by delegation certain governmental functions, also have a definite private or proprietary capacity. * * *
>
> In my opinion the Constitution did not mean to permit Congress, through the medium of bankruptcy laws, to break down the boundaries between Federal and State power even if the States gave their consent."

The Attorney General's conclusion is, therefore:

> "It is beyond the power of Congress, even with State consent, to enact any bankruptcy law which is applicable to the States themselves or to political subdivisions which are merely departments or branches of the State government."

6. THE PROHIBITION IN THE ACT AGAINST ANY DECREE OR ORDER OF THE COURT INTERFERING WITH THE GOVERNMENTAL OR POLITICAL POWERS OF THE STATE OR ITS AGENCY ITSELF PROHIBITS THE APPLICATION OF THIS ACT TO THE BONDS OF APPELLEES.

In this particular connection reference is made to the alternative writ of mandate issued by the Superior

Court of the State of California, in and for Tulare County, directed to the board of supervisors of the County of Tulare, directing the board to levy assessments upon certain lands for the purpose of paying the past due bonds and coupons of the appellees.

Whatever view may be taken of the general nature of a California irrigation district, and whatever view may be taken of the public or private character of the functions of the district in relation to distribution of the waters of the state, no other view can be taken of the control of the state over its public officers in the exercise of the sovereign right of the levy of taxes and assessments than that these are essentially political and governmental functions of the state itself.

7. THE ASHTON CASE IS CONTROLLING AND WILL NOT BE DISTURBED.

We have seen that the essential features of the new Chapter X of the Bankruptcy Act is not dissimilar to Chapter IX, held by this Court in the *Ashton* case to be unconstitutional. The same principles that were involved in the *Ashton* case are involved here. Indeed, any new principles that may be involved here seem to be of minor and certainly not of controlling consequences.

The *Ashton* case was rather well presented. The case was not only argued by able counsel but a rather formidable list of briefs were presented by the parties and by other interested persons including bondholders, irrigation districts, Reconstruction Finance Cor-

poration and the Attorneys General of a group of states. After full consideration this Court said (298 U. S. 513, 527):

> "* * * The evident intent was to authorize a federal court to require objecting creditors to accept an offer by a public corporation to compromise, scale down, or repudiate its indebtedness without the surrender of any property whatsoever. * * *
>
> It is plain enough that respondent is a political subdivision of the state, created for the local exercise of her sovereign powers, and that the right to borrow money is essential to its operation. * * * (p. 528.) Its fiscal affairs are those of the state, not subject to control or interference by the national government, unless the right so to do is definitely accorded by the Federal Constitution."

The Court quotes Mr. Chief Justice Chase in

Texas v. White, 7 Wall. 700, 725, 19 L. Ed. 227:

> "* * * the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government."

The Court cites

Collector v. Day, 11 Wall. 113, 125, and

Indian Motorcycle Company v. United States, 283 U. S. 570, 575, et seq., 51 S. Ct. 601,

and said:

> (p. 529): "Notwithstanding the broad grant of power 'to lay and collect taxes', opinions here plainly show that Congress could not levy any tax

on the bonds issued by the respondent or upon income derived therefrom."

And said further:

(p. 530): "The power 'to establish * * * uniform Laws on the subject of Bankruptcies' can have no higher rank or importance in our scheme of government than the power 'to lay and collect taxes'. Both are granted by the same section of the Constitution, and we find no reason for saying that one is impliedly limited by the necessity of preserving independence of the states, while the other is not."

"If federal bankruptcy laws can be extended to respondent, why not to the state?"

"If obligations of States or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs;"

"Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted. * * * The sovereignty of the state essential to its proper functioning under the Federal Constitution cannot be surrendered; * * *"

The Court has had occasion to consider the Ashton decision since it was rendered. The first time was upon a petition for rehearing, and that petition was denied October 12, 1936. (299 U. S. 619.)

Waterford Irrigation District, a California Irrigation similar in all respects to the Lindsay-Strathmore Irrigation District filed its petition under Chapter

IX. Following the Ashton decision that proceeding was ordered dismissed by the Circuit Court of Appeals for the Ninth Circuit. The District filed in this Court its petition for certiorari which was denied April 5, 1937. (300 U. S. 682.)

Merced Irrigation District, also similar to the appellant district here, likewise had its petition under Chapter IX ordered dismissed by the same Circuit Court of Appeals and petitioned this Court for certiorari. In that petition the district boldly asked that the *Ashton* case be reviewed and overruled. The petition was denied October 11, 1937. (82 Adv. App. 22.)

In

Brush v. Commissioner of Internal Revenue,
300 U. S. 352, 368,

the Court gave further consideration to the *Ashton* case and said:

> "We recently have held that the bankruptcy statutes could not be extended to municipalities or other political subdivisions of a state. Ashton v Cameron County Water Impr. Dist., 298 U. S. 513, 56 S. Ct. 892, 895, 80 L. Ed. 1309. The respondent there was a water-improvement district organized by law to furnish water for irrigation and domestic uses. We said (298 U. S. 513, at page 527, 528, 56 S. Ct. 892, 80 L. Ed. 1309) that respondent was a political subdivision of the state 'created for the local exercise of her sovereign powers. * * * Its fiscal affairs are those of the State, not subject to control or interference by the National Government, unless the right so to do is definitely accorded by the Federal Con-

stitution.' In support of that holding, former decisions of this court with respect to the immunity of states and municipalities from federal taxation were relied upon as apposite. The question whether the district exercised governmental or merely corporate functions was distinctly in issue. The petition in bankruptcy alleged that the district was created with power to perform 'the proprietary and/or corporate function of furnishing water for irrigation and domestic uses * * *' The district judge (In re Cameron County Water Impr. Dist. No. 1, 9 F. Supp. 103) held that the district was created for the local exercise of state sovereign powers; that it was exercising 'a governmental function'; that its property was public property; that it was not carrying on private business, but public business. That court, having denied the petition for want of jurisdiction, the district submitted a motion for a new trial in which it assigned, among other things, that the court erred in holding that petitioner was created for the purpose of performing governmental functions, 'for the reason that the Courts of Texas, as well as the other Courts in the Nation, have uniformly held that the furnishing of water for irrigation was purely a proprietary function * * *' Substantially the same thing was repeated in other assignments of error. In the petition for rehearing in this court (299 U. S. 619, 57 S. Ct. 5, 81 L. Ed.), the district challenged our determination that respondent was a political subdivision of the state 'created for the local exercise of her sovereign powers', and asserted to the contrary that the facts would demonstrate that 'respondent is a corporation

organized for essentially proprietary purposes.' It is not open to dispute that the statements quoted from our opinion in the Ashton Case were made after due consideration, and the case itself decided and the rehearing denied in the light of the issue thus definitely presented. Compare Bingham v. United States, 296 U. S. 211, 218, 219, 56 S. Ct. 180."

The Ashton decision was not placed upon narrow grounds but upon broad and well founded constitutional principles. It seems to have had careful consideration at the time it was rendered and since, Lower Courts and we may assume the citizens have acted upon it. We have not seen advanced, in the appellants' briefs, what would appear to be a sufficient reason for changing the decision in the *Ashton* case. Appellants have indicated certain changes in words between Chapter IX and Chapter X but the meaning seems to remain the same. If the *Ashton* case is not overruled it would seem then that the judgment here must be affirmed and Chapter X likewise held to be beyond the power of Congress.

See also:

James v. Dravo Contracting Co., ...U. S. .....,
58 Sup. Ct. Rep. 208; 82 L. Ed. Adv. Op. 125.

POINT B. THE BANKRUPTCY POWER IS SUBJECT TO THE FIFTH AMENDMENT.

Within the boundary of every irrigation district there are lands that are also within and constitute all or parts of counties, cites, towns, and taxing districts, including school districts, road districts, reclamation districts, and other public agencies, and the welfare of these districts, which share the same lands with the irrigation district, depends in whole or in part upon the success of the irrigation district, and none of their bonds rank ahead of the irrigation district bonds. California courts have held that the lien of assessments levied to pay bonds are of *equal rank* with counties and other governmental units.

LaMesa, etc. Irr. Dist. v. Hornbeck, 216 Cal. 730, 737.

A California irrigation district bond is a general obligation secured by the power of taxation.

Moody v. Provident Irr. Dist., supra;

Judith Basin Irr. Dist. v. Malott, 73 Fed. (2d) 142, 147;

Roberts v. Richland Irr. Dist., 289 U. S. 71, 74.

Lands in an irrigation district can never escape taxation, not even by sale to the district itself, for when lands sold to the district again pass back into private ownership they again become subject to assessments.

Under the provisions of the California Irrigation District Act, Section 39 (see Appendix), it is the duty

of the board of directors to levy assessments for the bond obligations as they mature.

It will be presumed that what the law requires to be done has been done. At any rate, the appellees have obtained a vested right in the funds collected, the assessments made, and the tax certificates issued, as well as in the lands sold pursuant to the requirements for sale of tax delinquent lands, and although these may not be strictly property rights, the officers of the district are trustees for the bondholders for such trust properties.

People v. Bond, 10 Cal. 563, 574;
River Farms v. California Gibson, 4 Cal. App. (2d) 731;
Meyers v. City of Idaho Falls, 52 Ida. 81, 11 Pac. (2d) 626, 628;
Shouse v. Quinley, 3 Cal. (2d) 357, 360;
Cruzen v. Boise City (Ida.), 74 Pac. (2d) 1037, 1040.
Thompson v. Emmett Irr. Dist. (Ida.), 227 Fed. 560, 566;
Thompson v. Clark, 6 Cal. (2d) 285, 296;
Hidalgo County Rd. Dist. v. Morey, 74 Fed. (2d) 101, 104.

In this connection attention is directed to the writ of mandate (R. 50) issued by the Superior Court.

Since the 90's the agriculturists of California and its law-makers have studiously applied themselves to the task of making these bonds the most desirable securities upon the market. This they have done for

the purpose of developing the State of California through the means of its greatest resources, irrigation and agriculture. A certificate bearing the Great Seal of the State of California is affixed to each irrigation bond, approved by the Commission, hereinabove referred to, irrevocably declaring it to be a lawful investment for banks, insurance companies, trust funds, and the like, yet under this act of Congress these bonds are to be singled out to be scaled down, whereas bonds of equal rank, county bonds, school bonds, and other bonds, are to be paid in full and while mortgages and deeds of trust are to be benefited by the reduction of the bonded debt of the irrigation district, insuring the payment of these secondary obligations at the expense of a preferred class.

Furthermore, no account is taken of Section 52 of the California Irrigation District Act, which, as interpreted by the decisions of the California Supreme Court,

Selby v. Oakdale Irr. Dist., 140 Cal. App. 171,

makes each bond and coupon when presented an obligation with a separate priority as to the order of payment.

Finally, property rights are transferred from the bondholders to the landowners. The landowners of the district, in a broad sense, since the state has delegated to the local community a wide discretion and given to the landowners a certain interest upon dissolution, are somewhat comparable to the stockholders of a corporation, and under the principles of the *Boyd* case one class of creditors is not permitted to par-

icipate in the assets until provision has been made or the superior class. There is no right in the stockolders to receive anything out of the corporation efore all the creditors have been paid, and it was for hat reason that there was written into the provisions f the Corporation Reorganization Act the provision hat the court must see that the act does not discriminate unfairly in favor of any class of creditors. That appears to be the reason and purpose of that rovision.

We find such a provision in the Municipal Bankuptcy Act but the plan in this case does not propose ny such distinction.

We take it that if this statute is constitutional then he court has power to violate trust provisions, to single ut the irrigation bondholders for scaling down of lebts, and to permit the school district bondholders and he county bondholders to be paid in full; to permit he holders of junior encumbrances, namely, mortgages nd deeds of trust, to collect their debts in full at he expense of the bondholders; to permit the stockolders, as it were, of the corporation, namely, he landowners of the district, to retain part of their ssets when the first lien creditor will be paid less han 60% of the face amount of his obligation.

As a matter of justice, fairness and equity such a ling cannot be done, but the statute purports to do , and therefore we have treated the question as rgely a legal question and we maintain that if the t permits these things to be done the act is unconitutional.

The now historic *Boyd* case establishes as a r
result that if the plan of reorganization gave a bene
to the stockholders of the old corporation, old cre
tors who had received no offer of participation
the plan could follow the property of the old corp
ration into the hands of the new corporation to t
extent of the benefit conferred upon the stockholde

Northern Pacific Ry. Co. v. Boyd, 228 U.
482, 33 Sup. Ct. 554 (1913).

Upon reorganization the stockholders may not
ceive any interest or rights in the reorganized corp
ration in preference to the creditors.

Railroad Co. v. Howard, 74 U. S. (7 Wal
392 (1868);

Louisville Trust Co. v. Louisville Ry. Co., 1
U. S. 674, 19 Sup. Ct. 827 (1899);

*Mountain State Power Co. v. Jordan Lumb
Co.,* 293 Fed. 502, certiorari denied, 264
S. 582, 44 Sup. Ct. 332 (1924);

*Western Union Tel. Co. v. United States
Mexican Trust Co.,* 221 Fed. 545.

The *Boyd* case states the principle that any pl
of reorganization which provides for the participati
of stockholders without making provision for un
cured creditors is an unfair plan, and that this
true whether or not any equity exists in the proper
of the old company above the secured indebtedne
The principle of the *Boyd* case is really one of fraud
lent conveyance. For the purpose of doing just
the veil of the corporate entity is pierced and

stockholders are treated as if they were the corporation.

In the *Boyd* case the court declared:

> *"For, if purposely or unintentionally a single creditor was not paid or provided for in the reorganization he could assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payment of corporate liabilities. Any device whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor was invalid. Being bound for the debts, the purchase of their property by the new company, for their benefit, put the stockholder in the position of a mortgagor buying at his own sale."* (Italics ours.)

From this quotation it will be readily seen that the *Boyd* case has as its underlying principle the idea that the mortgagor is not to be allowed to participate in any plan of reorganization which does not first provide for all of its creditors. If it were allowed to do so while any creditor was excluded, the result of the foreclosure sale would be a fraudulent conveyance.

The bankruptcy power is subject to the Fifth Amendment.

Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 589.

The operation of this act violates the Fifth Amendment in that (1) it takes trust funds which belong to

the appellees, (2) it transfers rights from the appellee to bondholders of other taxing agencies, (3) it transfers property from the appellees to mortgage holder within the district, (4) it transfers property from th appellees to landowners, (5) it violates the principle of the *Boyd* case.

Furthermore, if the public interest requires, resor should be had to the taxing power so that the burde of relief afforded in the public interest may be born by the public.

Louisville Joint Stock Land Bank v. Radfor 295 U. S. 555, 602;

County of Los Angeles v. Jones, 6 Cal. (2d) 695

County of San Diego v. Hammond, 6 Cal. (2d 709;

City of Crescent City v. Moran, 92 C. A. D. 45

POINT C. REGARDLESS OF THE CONSTITUTIONALITY O THE ACT, THE PETITION DOES NOT STATE FACTS SU FICIENT TO CONSTITUTE A CAUSE OF ACTION OR GIV THE COURT JURISDICTION.

1. The petition does not show insolvency and it d nies the truth of the allegation that the district is u able to meet its debts as they mature (R. 5 and 8 stating that "petitioner did in the year 1933 and a years subsequent thereto" operate under Sec. 11 of th Districts Securities Commission Act of the State California (Appendix). Under this statute the di trict was and is only required to levy such assessmen as it is "reasonably possible for the lands in said di trict, taken as a whole, to pay".

2. The petition shows that each bond and coupon is in a separate class and not "payable without preference out of funds derived from the same source" as required by Section 83, subsection b, for inasmuch as the petition affirmatively shows that the bonds and coupons have been presented as provided in Section 52 of the California Irrigation District Act (Appendix) and are therefore payable in order of presentation, and not pro rata. (R. 3)

Bates v. McHenry, 123 Cal. App. 81.

3. The petition also shows on its face that the required consents of creditors have not been obtained inasmuch as the only consent obtained is that of the Reconstruction Finance Corporation, which is not affected by the plan, because despite the wording of Section 82 purporting to provide that any agency of the United States holding securities acquired pursuant to contract with any petitioner "shall be deemed a creditor in the amount of the full face value thereof", Reconstruction Finance Corporation is not affected and is not the owner of the bonds as a matter of law.

The plan itself ~~states~~ shows that "provision is made in the plan for the protection of the interests" of such creditor (R. 4), a situation eliminating the right to count these claims in reckoning the percentage of consents. Section 83, subsection c. Furthermore, as indicated above, the charter of the Reconstruction Finance Corporation limits the right of that corporation to make loans to irrigation districts for the purpose of enabling them to reduce or refinance their outstanding indebtedness. (Title 43, Section 403, U. S. C.) The cor-

poration could only have acquired bonds under tha act, and having acquired them they did so pursuan to that act, and they can never collect from the di trict more than the amount already loaned, 59¢ on th dollar, with 4% interest. They are therefore not ad versely affected by the plan, and the petition mu fail for insufficiency, the act specifying, Sectio 83, subsection a, that the petition shall state tha creditors owning 51% in amount of securities "a fected by the plan" have accepted it in writin The provision that the contents of the list of cred tors shall not constitute admissions by the pet tioner, obviously placed in the act to entitle the pet tioner to make proof of holdings, is no denial of th elementary truth of the assertion that the petitio shows on its face it is not supported by consents creditors affected by the plan.

Under its charter the corporation could determi that all or by far the major part of the debts of th district could be reduced by the loan. This point wa reached.

In this connection attention is called to the ord approving petition as properly filed and for notice creditors (R. 15), signed by the district judge *ex parte*, in which it is recited that oral testimony wa offered, and the court cites "that approximately 87 of such securities have in writing accepted said plan The court is not authorized by the act to determi this matter, except for the purpose perhaps of passi upon the sufficiency of the petition in a preliminar way.

4. The plan shows gross unfairness on its face since if it be construed that the Reconstruction Finance Corporation is a creditor affected by the plan, it is proposed in the plan that the Reconstruction Finance Corporation shall receive bonds payable over a period of years and constituting a marketable security, bearing 4% interest, whereas the appellees under the plan are to receive cash, which they cannot now invest in such attractive securities.

POINT D. THE CAUSE IS RES JUDICATA.

At the hearing on the motion to dismiss, and on the return to the order to show cause, appellees filed a certified copy of the "Judgment of Dismissal" in the former proceeding under Section 80 entered July 26, 1937 (R. 69), entered pursuant to the Circuit Court Mandate in *Bekins v. Lindsay-Strathmore Irrigation District,* 88 Fed. (2d) 1004.

Subsection "h" of Section 83 of the Act provides that Chapter X shall not be construed to *modify* or *repeal* the former act and only that "the initiation" of proceedings or the "filing of a petition" under Section 80 shall not constitute a bar.

POINT E. THE UNITED STATES IS NOT A PROPER PARTY TO THIS APPEAL.

The point here is that the Judiciary Reform Act, Section 401, provides that the court shall permit the United States to intervene upon the question of con-

stitutionality of the act "whenever the constitutionality of any act of Congress affecting the public interest is drawn in question * * * in any suit * * * to which the United States, or any agency thereof * * * is not a party". Appellees make the following points:

(1) This is not an act affecting the public interest, since only the relationship between citizens of one state and the state itself, or its instrumentality, are affected. It may be a matter of public concern of the State of California, but it is no matter of public concern of the peoples of the United States.

(2) Inasmuch as the Reconstruction Finance Corporation, an agency of the United States, is a party to the proceeding if it is a bondholder compelled to give consent it has consented to the plan; it has filed its proof of claim.

(3) The form of government of the United States does not contemplate or permit the government to interfere in the private affairs of its citizens even where those private affairs result in litigation between parties as to private rights.

> "The United States has no inherent sovereign powers, and no inherent common law prerogatives *and it has no power* to interfere in the personal or social relations of citizens by virtue of authority deducible from the general nature of sovereignty."
>
> 65 *Corpus Juris* 1254.

ANSWER TO BRIEF OF APPELLANT LINDSAY-STRATHMORE IRRIGATION DISTRICT.

At the time of writing this brief, March 18, 1938, no brief has been received on behalf of the United States in cause No. 757, and it is considered that the brief of the appellant Lindsay-Strathmore Irrigation District is sufficiently answered by the arguments set forth above, except that attention is here called to the fact that appellees take the position that by whatever name called, Chapter X purports to be a statute on the subject of bankruptcy, and that it does seek to adjust the relationship between debtors and creditors, and that the question of the extent of the compulsion involved is not determinative of the nature of the petition.

Furthermore, appellant's argument in points 1 and 3 are somewhat inconsistent since in point 1 it claims that Chapter X is a law on the subject of bankruptcy, whereas in point 3 appellant contends that there must be some distinction drawn because "no compulsion is brought to bear upon the debtor in a composition case". The only compulsion is the coercion felt by the dissenting creditors.

If Congress has any power it has plenary power.

ANSWER TO THE BRIEF OF UNITED STATES.

The argument of the government, upon which we wish to comment, will be considered in the order in which it is there set out in the Solicitor's brief.

I. THE NECESSITY FOR FEDERAL RELIEF.

Emergency, if such there be, creates no enlargement of power.

Worthen v. Kavanaugh, 295 U. S. 56.

In fact, it may well be, ~~as~~ said by the Supreme Court of Nebraska in *First Trust Company of Lincoln v. Smith,* 277 N. W. 762, that the emergency created by the depression is a thing of the past and the country now faces a permanent condition of affairs.

It is thought that the amount of one billion dollars or more involved in the 2000 taxing units which defaulted in the late depression is the amount of the *bond issues* involved—not the amount of the default; but even so, the fact that but 47 petitions (less than one to the state) were, under Chapter IX, ever approved, would seem to show the lack of any real need of this legislation, even conceding that the point is material.

II. THE ACT IS NOT WITHIN THE BANKRUPTCY POWER.

The bankruptcy power, even under the assumption that it extends to the State or its agencies is inapplicable to the Lindsay-Strathmore Irr. Dist. because,

The Lindsay-Strathmore Irrigation District Is Not the Debtor.

The sole remedy of the bondholders is to compel the levy of assessments upon all of the lands of the district by a writ of mandate.

Nevada National Bank v. Poso Irrigation District, 140 Cal. 344;

Thompson v. Perris Irrigation District, 116 Fed. 769;

Perris Irrigation District v. Thompson, 116 Fed. 832;

Moody v. Provident Irrigation District (supra).

The case of *Moody or Provident Irr. Dist.* (supra) holds that the district acts in the capacity of trustee under Section 29 of the California Irrigation District Act (appendix).

We are justified, therefore, in giving consideration to the proposition that the obligations on the bonds of the Irrigation District in California are not debts of the district within the meaning of the bankruptcy act. It is true that the obligations on the bonds arise from the loan of money to the district, which of itself under the English Common Law, would create an implied assumpsit. But the obligation thus created has been changed to a statutory contractual obligation and while the bond contains a promise to pay, we must take the case presented by the bonds and the statutes by its four corners, from a consideration of which we arrive at the conclusion that the obligation of the irrigation district as a juristic person is the obligation to carry out the duties imposed by the statutes providing for the levy of assessments and the collection of the same and the payment of the proceeds

thereof to bondholders as provided by the California Irrigation District Act.

It would appear, therefore, that the sole obligation of the district and its officers is to perform those duties, and once having performed them there is no further obligation upon the district. The fact that no execution can be issued for the obligation, the fact that payment cannot be recovered from any fund other than the bond fund, the fact that the district cannot be compelled to pay, except as moneys come into the bond fund, lead to the conclusion that the bond is not a debt or an obligation in the sense and meaning of the bankruptcy act, and that in so far as the California Irrigation District is concerned, there is merely a legal duty imposed upon a trustee, the irrigation district, to perform certain duties prescribed by the legislature.

This question bears upon the problem in hand in two important particulars—first, the obligations under the bonds are not debts which could be discharged by proceedings under the bankruptcy act; secondly, if there is any obligation, the obligation is that of the landowner to meet the assessments levied and that question bears upon the fifth amendment, because other obligations of the landowners, such as their obligations to pay county and school bonds, and their obligations to pay assessments for other improvements, and their mortgages and deeds of trust are not scaled down or refunded in the same proportion, or at all.

It was said in the case of *Judith Basin Irrigation District v. Malott*, 73 Fed. (2d) 142, in a case in which all of the property had been sold at tax sales,

and in which the Court noted that the law of Montana is patterned after the Wright Act of the State of California, that:

> "It has been uniformly held that bonds of an irrigation district issued in pursuance of the Wright Act—are general obligations of the district."

and further:

> "The payment of the bonds of earliest maturity does not release any parcel of land from the lien of the bonds, and all of the lands within the district, according to the terms of the bond and of the statute, are liable for the payment of the unpaid bonds."

In the case of

Hershey v. Cole, 130 Cal. App. 683, 20 Pac. (2d) 972,

the Court said:

> "The conclusions drawn therefrom that there is no contract or quasi contract in legal effect between the landowners of the district and the purchasers of bonds of the district does not appear to be supported either in principle or by the authorities."

From one view, therefore, these debts are not debts of Lindsay-Strathmore Irrigation District, although they are general obligations in the sense that all of the land within the district is forever liable to be taxed therefor until the bond is paid, even after tax sale. If, as has been said, equity will pierce the veil and look at the facts, in so doing will find that substantially, the bond is not a debt of the irrigation district, but is either one of two things, either it is a debt of the landowner as such, in accordance with

the theory of *Hershey v. Cole* (see Dissolution Stat utes (Appendix B)), that the bond is a contract be tween the landowner and the bondholder, or it is debt of the sovereign State of California. If it is debt of the landowner it explains why one's sens of justice and fairness is shocked by realizing tha under the Municipal Bankruptcy Act this debt ca be scaled down on the theory that it is a debtor of th irrigation district, whereas the obligations of the *sam land* to bondholders of the county, school districts an other tax units will be paid one hundred cents on th dollar, and also at the same time obligations upon th mortgages and deeds of trust of the landowners wi escape reduction or scaling down altogether.

On the other hand if the view be taken that the are obligations of the sovereign, and in support o this view it it pointed out that these bonds bear th Seal of the State of California, that they bear a cer tificate of the State Controller, and that since th sovereign created the district and it is a state legis lative mandatory, *Tarpey v. McClure,* 190 Cal. 593 then in a true sense these are debts of the sovereign which sovereign also created debts in favor of count bondholders and school bondholders, limited perhap as to security to a certain geographical division of th State. It has been seen that the correct view is tha the property of the district is the property of th State.

In either view taken, therefore, the Lindsay-Strath more Irrigation District cannot be a subject of bank ruptcy, for the real debtor, whether it be the Stat or whether it be the landowner, is not reached in thes proceedings.

Which is just another illustration of the fact that a statute which disregards sound principles of law and justice is sure to be difficult to fit into any sound system of jurisprudence.

THE EXTENT OF THE BANKRUPTCY POWER.

The solicitor general suggests that apart from the effect of the Eleventh Amendment "if only the State have an indebtedness which it cannot pay the sovereign aspects of the state government are irrelevant to the bankruptcy power".

The solicitor general cannot himself raise the whole question of State sovereignty and States rights and the relationship of the State to Federal power and limit appellees to the narrow consideration of the effect of the proceedings upon the appellant district.

By the scope of the challenge to the whole theory of State sovereignty, appellees warn that this attack is but the forerunner of the government's position that Congress has power to extend bankruptcy to the State itself; that Congress has also power to tax the bonds of the State agencies and to tax the properties thereof.

We reiterated the principle that if Congress has any power under the bankruptcy clause, it has *plenary* power—and such sweeping power would be shocking to our concept of dual sovereignty under our constitutional system and therefore we may safely assume that the power does not exist.

Next we take sharp issue with the statements of counsel that "It is settled beyond dispute that the Federal Courts have full power to adjudicate and control the relations between districts of this nature and their creditors".

The Government concedes that in the absence of statute, *receivership* is not a remedy available in Federal or State Courts. Furthermore *equity* is not available.

Federal Courts have through their equity jurisdiction exercised considerable control over classes of corporations which were not amenable to the bankruptcy statutes, and it was not unreasonable to expect therefore that creditors of municipalities should appeal to the equity side of the Federal Courts and seek federal receivership for the purpose of the enforcement of their rights, particularly where the state law gave little or no remedy which was of any substantial benefit to the bondholder or creditor.

In the case of

Heine v. Board of Levee Commissioners, 19 Wall. (86 U. S.), 655,

the Court said:

> "The power we are asked here to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State or National. In the case before us the National sovereignty has nothing to do with it. The power must be derived from the legislature of the state. So far as the present case is concerned, the State has delegated the power to the Levee Commissioners. * * * It certainly is not vested as in the exercise of an original jurisdiction in any Federal Court. It is unreasonable to suppose that the legislature would ever select a Federal Court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by

the judiciary of the federal government of the legislative functions of the State government."

See also *Merriwether v. Garrett* (supra). The government seems unable to cite any reliable authority holding that the Federal Courts have the power to levy and collect taxes by any officer of the Court, except such authority be expressly *or* impliedly given *by state law.*

Whatever jurisdiction has been entertained on behalf of the bondholders has been to *enforce* rights and uphold contracts—never to destroy or effect their repudiation.

VIOLATION OF THE CONTRACTS CLAUSE.

The question of the contract clause seems inapplicable here:

(a) The act dispenses with state consent.

(b) The "Enabling Act" of California (Stats. 1935, Chapter 24), is not effective as a consent to these proceedings (see Appendix).

(1) The title to the act relates to Chapter IX and not to Chapter X or any other law.

(2) Section 1 of said act, states that "For the purpose of this act a 'taxing district' is hereby defined to be a 'taxing district' as described in Chapter IX" * * * They are there described as *political subdivisions.* If so, the rule in Ashton applies. If not, the rule in:

In re Imperial, 87 Fed. (2d) 355,

applies. (See Brief of Appellant District, p. 16.)

(3) Moreover, section six negatives consent since by it the district may repudiate the plan after it is confirmed by the Court.

NO CONSENT ON THE PART OF THE STATE CAN IMPAIR THE OBLIGATION OF CONTRACT OR ADD TO THE POWERS OF CONGRESS UNDER THE BANKRUPTCY CLAUSE.

The state is prohibited by Clause 1, Section 10, Article 1, of the Constitution from impairing the obligation of contract.

It cannot be doubted that bonds of a taxing district, such as here involved, constitute contracts of that agency and that the law at the time the contracts were made enters into and becomes a part of the contracts. (*Hershey v. Cole,* 130 Cal. App. 683, 688, 695.)

It follows that if these contracts (bonds) are to be impaired without the consent of the parties, it must be done under the Bankruptcy Clause and not otherwise. All other impairment is expressly prohibited. If Congress has this power, it may be exercised through proceedings, voluntary or involuntary, with or without, or over, the protests of the state, or in behalf of, or against, the agency of the state or the state itself. If the Congress does not have the power, the state is wholly powerless to give it except through concurrent action in the form of an amendment to the Constitution. An extremely important feature of the American constitutional arrangement is the reservation of power to the states or the people. One state cannot amend the Constitution.

Surely, since the Constitution of the United States prohibits the state from impairing the obligation of

contracts, the Congress of the United States cannot empower the state to do so.

Equally, if the Constitution of the United States does not authorize the Congress to pass a bankruptcy act which would apply to a state or a state agency, the legislature of the state cannot pass an act to authorize Congress to do so.

In *Hopkins v. Cleary*, 296 U. S. 315, 340, the Court said:

> "Aside from the direct interest of the state in the preservation of agencies established for the common good, there is thus the duty of the parens patriae to keep faith with those who have put their trust in the parental power. True, most of the shareholders in the cases now before us assented to the change. Even so, an important minority were not represented at the meetings, and their approval is not shown. Creditors others than shareholders have not been heard from at all. To these non-vocal classes the parens owes a duty. * * *"

III. THE RESERVED RIGHTS OF THE STATES AND OF THE PEOPLE ARE INVADED.

The Solicitor General says these things:

1. "Apart from any effect of the Tenth Amendment, it (the act) violates no constitutional limitation."

2. "The Tenth Amendment has no application to powers which are delegated to the Federal Government."

3. "But perhaps the most frequent expressed purpose of the Tenth Amendment was to insure that the states should continue sovereign with respect to the numerous powers which had *not* been granted to Congress."

4. "The adoption of the Tenth Amendment was accompanied by a deliberate refusal to reserve to the states all powers not 'expressly' granted to the national government."

5. The conflicting viewpoints "* * * indicate the need for a more precise articulation of the relationship between state and nation when the latter undertakes to exercise delegated power."

6. "The argument of respondents so far as it is based on the Tenth Amendment, must of necessity begin with the premise that the power in question is reserved to the states alone and therefore cannot be exercised or affected by the central government.

7. "If a given power is reserved to the states alone, it is only because it is not delegated to the national government."

8. "The existence of federal power must accordingly be determined solely in the light of the power granted to the Federal Government. This principle of constitutional interpretation in no way excluded from consideration the necessity of maintaining unimpaired our dual system of government."

9. "However, recognition of the fact that the scope of Federal powers must be construed in the light of the dual system of government does not alter the

basic principle that the question must always be whether or not the power has been granted to the United States."

Upon analysis these statements, which are the very heart of the Solicitor General's argument, amount to this:

That there is no constitutional limitation upon the bankruptcy power except it be in the Tenth Amendment. This Amendment has no application to powers delegated to Congress and unless the power is reserved to the states it is delegated to Congress. Dual sovereignty must be interpreted in this light also. The ultimate question is, therefore, whether or not the power was granted to Congress and the Court should make a new declaration on this subject of states rights.

The Government seems to have built up a startling and hitherto unrevealed argument under this head.

1. The doctrine of dual sovereignty is to bow to the supremacy of delegated powers.

2. Unless the power is reserved to the states it is delegated to Congress.

At the outset appellees concede that by the Tenth Amendment not only are express powers of Congress recognized, but also the implied powers. And appellees concede further, that the intention of the framers of the Constitution was that the Constitution standing alone was intended to mean everything that is embodied in this Amendment, but the people deemed it necessary that there be no argument or chance upon the subject, hence the Amendment.

On the other hand, appellees do not concede that the doctrine of dual sovereignty is fully expressed in or limited by the Tenth Amendment.

On the contrary, the Tenth Amendment must be interpreted in the light of this doctrine.

Collector v. Day, 11 Wall. 113.

Two principles of construction of our Constitution bar acceptance of the Government's position—the first is the doctrine of dual sovereignty under which neither sovereign may impair the powers of the other and neither may surrender its powers to the other.

The second is that neither the states nor the nation may encroach upon the rights of the sovereign people.

The Tenth Amendment was careful to express this second principle wherein it says "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

Here is that "No Man's Land" of the Constitution which the Government would remove.

Rather here is that last barrier to the deprivation of certain inalienable rights which are retained by the sovereign people from whom they can be taken only by the vehicle of grant provided by the Constitution,—Amendment.

> "The powers the people have given to the general government are named in the Constitution and all not there named either expressly or by implication are reserved to the people and can be exercised only by them, or upon further grant from them."

Per Mr. Justice Brewer, concurring in *United States v. Williams,* 194 U. S. 279, 294.

The People may abolish trial by jury and the writ of habeas corpus. The People may do away with free speech and the liberty of the press. They may permit titles of nobility and religion regulated by law, but until the People have been consulted neither the legislature of the states nor the nation can abolish the jury nor the writ, nor abridge the freedom of speech, etc. In other words, there are a few powers that the People simply have not given to either of their governmental agents.

IV. THE ACT INVADES THE SOVEREIGN RIGHTS OF THE STATES.

The Government concedes that unless the powers granted the district by the state "include authority to compose its debts and to invoke the jurisdiction of the bankruptcy court, the taxing agency cannot seek the benefit of the Act of August 16, 1937."

We have seen that this act does not require the state consent, but if it does—then the constitutional prohibition imposed by U. S. Constit. Art. 1, Sec. 10 and Art. 1, Sec. 16 of the California Constitution (impairment of the obligation of contracts) applies, and as said in the *Ashton* case, one state cannot enlarge the power of Congress.

Appellees reiterate that this district is not subject to the exercise of general equity powers of the Federal Courts; that respondents (appellees) emphatically

have not asked that nor ever represented that receivership proceedings lie within the Federal powers as to California irrigation districts.

Appellees note that the Government likewise concedes, finally, that "The power to compel acceptance by minority creditors is the heart of the bankruptcy power" although it claims that it operates *upon the creditors* of the district. Income tax would operate in the same way.

The Solicitor places a good deal of stress upon certain California cases holding that these districts are not "political subdivisions".

Whether these districts are, or are not, political subdivisions in the sense in which the term has been employed, we submit is quite immaterial. By the highest authority, we have seen that they are state agents exercising governmental powers.

La Mesa Irrigation District v. Hornbeck, 216 Cal. 730 (we respectfully submit), *does not hold* the tax liens to be *inferior* to those of counties *but on the contrary* holds the lien of state, county, city and irrigation taxes to be on a *parity.* Furthermore, under Sec. 45-8 California Irrigation District Act (Appendix A) the district is entitled to possession and to the rents before the state itself. (The period for redemption for the state is five years. The period for the district is three years.)

CONCLUSION.

We have seen that the Bankruptcy Clause and the Taxing Clause of the Constitution are both couched in the most general language and we have further seen that if the Federal Government and this Court has held that if the Federal Government were permitted to tax the state and its governmental agencies, it would necessarily follow that the Federal Government would have power by taxation to embarrass, hamper and ultimately destroy the independence and the independent functions of the state. This necessarily follows because of our dual system of government. We have further seen that a bankruptcy measure that could place the fiscal affairs of the state under the control of the Court of Bankruptcy could likewise destroy the independence and the independent functions of the state. Therefore, the state would not, it would seem, be any more subject to the Bankruptcy Clause than to the Tax Clause.

We have seen that an irrigation district in California call it what you will—a political subdivision, a public corporation, a state agency, a governmental mandatory—is in any event, an agency of the state performing prescribed governmental functions on behalf of the state and thus, partakes of state sovereignty.

We have further seen that the organization of the irrigation district is in legal effect, simply a trustee to carry on certain prescribed work on behalf of the state on the one hand, or the landowners on the other, and that the true debtor is either the state or the

landowner, and that any act that would permit the scaling down or repudiation of the district bonds without at the same time, likewise scaling down or repudiating bonds of other public agencies and private mortgages and trust deeds, is discriminatory and violative of the Fifth Amendment and denies to the district bond holder the equal protection of the laws.

It is respectfully suggested that the *Ashton* case has settled the question here involved; that Chapter Ten of the Bankruptcy Act does not cure the constitutional defects that were found in Chapter Nine and that following the *Ashton* decision, Chapter Ten of the Bankruptcy Act ought to be held to be beyond the power of Congress and the judgment of the lower Court sustained.

For the foregoing reasons, the judgment of the District Court should be affirmed.

Dated, Turlock, California,
March 25, 1938.

Respectfully submitted,
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(Appendices A, B, C and D Follow.)

Appendices

CALIFORNIA IRRIGATION DISTRICT ACT AND RELATED LAWS.

Preliminary statement.

In 1887 California passed the first irrigation district act of general application providing for the issuance of bonds. This act, known as the Wright Act, remained on the statute books until 1897, when it was rewritten and re-enacted as an entirely new law, which with its amendments is now known as the California Irrigation District Act.

Only certain portions of the acts hereinafter referred to are set forth, being those portions which were deemed important.

(Note): The portions of the irrigation district act set out are intended to be as the act was when the bonds were issued.

Appendix A

1. THE CALIFORNIA IRRIGATION DISTRICT ACT.

An act to provide for the organization and government of irrigation districts, and to provide for the acquisition or construction thereby of works for the irrigation of the lands embraced within such districts, and, also, to provide for the distribution of water for irrigation purposes. (Approved March 31, 1897, Stats. 1897, p. 254.)

Proposal for organization.

Section 1. A majority in number of the holders of title, or evidence of title, including the holders of possessory rights under receipts or other evidence of the rights of entrymen or purchasers under any law of the United States or of this state, to lands susceptible of irrigation from a common source and by the same system of works (including pumping from subsurface or other waters); such holders of title, or evidence of title and of possessory rights, representing a majority in value of said lands, according to the equalized county assessment roll or rolls for the year last preceding, may propose the organization of an irrigation district, under the provisions of this act. Such lands need not consist of contiguous parcels.

Said equalized assessment roll or rolls shall be sufficient evidence of title and of such possessory rights, for the purposes of this act, except that where property is assessed to unknown owners or the assessment roll does not purport to give the true name or gives

the names of a portion only of the owners of any parcel, the actual owners of said property shall be considered the owners for all the purposes of this act, and owners of undivided interests may sign for such interest and each such owner shall be considered as one assessment payer; and provided, further, that guardians, executors, administrators or other persons holding property in a trust capacity under appointment of court may sign any petition provided for in this act, when authorized by an order of court, which order may be made without notice. A certificate of acknowledgment taken before a notary public or justice of the peace of any state, or an affidavit by any person in the presence of whom such petition was signed, shall be sufficient evidence of the genuineness of such signature. (As amended, Stats. 1915, p. 1367.)

Petition to organize district.

Sec. 2. In order to propose the organization of an irrigation district, a petition shall be presented to the board of supervisors of the county in which the lands within the proposed district, or the greater portion thereof, are situated, signed by the required number of holders of title, or evidence of title, including such aforesaid possessory rights, to lands within such proposed district, and representing the requisite majority in value of said lands, which petition shall set forth generally the boundaries of the proposed district and also shall state generally the source or sources (which may be in the alternative) from which said lands are proposed to be irrigated, and shall pray that the territory embraced within the boundaries of the proposed

district may be organized as an irrigation district under the provisions of this act. The petition may consist of any number of separate instruments, and must be accompanied with a good and sufficient undertaking, to be approved by the board of supervisors, in double the amount of the probable cost of organizing such district, conditioned that the sureties shall pay all of said costs in case said organization shall not be effected. Said petition shall be presented at a regular meeting of said board and shall be published for at least two weeks before the time at which the same is to be presented in some newspaper of general circulation printed and published in the county where said petition is presented, together with a notice stating the time of the meeting at which the same will be presented; and if any portion of the lands within said proposed district lie within another county or counties, then said petition and notice shall be published, as above provided, in a newspaper published in each of said counties. When contained upon more than one instrument, one copy only of such petition need be published, but the names attached to all of said instruments must appear in such publication. On or before the day on which said petition is presented to said board of supervisors, a copy of said petition shall be filed in the office of the state engineer. When said petition is presented, said board of supervisors shall hear the same and shall proceed to determine whether or not said petition complies with the requirements hereinbefore set forth and whether or not the notice required herein has been published as required, and must hear all competent and relevant testimony offered in support of or in oppo-

sition thereto. Said hearing may be adjourned from time to time for the determination of said facts, not exceeding two weeks in all. No defect in the contents of the petition or in the title to or form of the notice or signatures, or lack of signatures thereto, shall vitiate any proceedings thereon; provided, such petition or petitions have a sufficient number of qualified signatures attached thereto. The determination of the board shall be expressed by resolution. If it shall determine that any of the requirements hereinbefore set forth have not been complied with, the matter shall be dismissed, but without prejudice to the right of the proper number of persons to present a new petition covering the same matter or to present the same petition with additional signatures, if such additional signatures are necessary to comply with the requirements of this act. If the board of supervisors shall determine that the petitioners have complied with the requirements hereinbefore set forth, it shall cause a copy of the resolution so declaring to be forwarded to the state engineer and shall postpone further hearing of said petition for one month, or from time to time, not exceeding one month in all. Upon receiving a copy of said resolution, the state engineer shall make or cause to be made such an investigation as may be practicable, with a view to determining whether any condition or conditions exist that would justify him in reporting against the organization of the proposed district. He shall report in writing on the matter to the board of supervisors from which the copy of said resolution was received, and said report shall be made within one month from the date of the adoption of said resolution,

but failure by the state engineer to perform any duty required herein shall not invalidate the organization of any district, nor shall any board of supervisors, because of failure to receive a report from the state engineer, delay the proceedings herein required for a longer time than is allowed herein. If the state engineer shall report that the supply of water available for the use of the proposed district, or that may be acquired by any practicable means, including the condemnation of existing rights, is not sufficient or that the project is not feasible for any other reason or reasons and if such report shall be filed with the said board of supervisors before the expiration of one month from and after the date of the adoption of the aforesaid resolution, the hearing of the petition shall again be continued for one month and shall then be dismissed, unless the board of supervisors shall be required in writing by three-fourths of the holders of title or evidence of title, including possessory rights to lands within said proposed district to grant the same; provided, that if such request is not received, the board of supervisors may modify the plans for the proposed district in accordance with recommendations by the state engineer. If the report of the state engineer shall not compel the continuance of the matter as aforesaid, the board of supervisors shall, at the regular meeting at which said report shall have been received, proceed to a final hearing of the petition, and if said board shall, after receiving an adverse report from the state engineer, decide to modify the plan as set forth in said petition or shall be requested in writing by three-fourths of the holders of title or evidence of

title, including possessory rights, to the lands within said proposed district to grant said petition, said board shall then proceed to a final hearing of the matter. On any final hearing herein provided for, the board may adjourn from day to day, but not for a longer time, until a determination of the matter is reached. On said final hearing said board shall make such changes in the proposed boundaries as it may deem advisable and shall define and establish such boundaries; but said board shall not modify said boundaries so as to exclude from such proposed district any territory which is susceptible of irrigation from any of the sources proposed, unless said board shall decide to modify the plan for such proposed district, as herein provided, nor shall any lands which will not, in the judgment of said board, be benefited by irrigation by means of any of said systems of works be included within such proposed district. Any person whose lands are susceptible of irrigation from any of the proposed sources may, upon his application, in the discretion of said board, have such lands included within said proposed district. (As amended, Stats. 1913, p. 994.)

Order of supervisors reaffirming conclusions.

Sec. 3. Upon the final hearing of said petition or said matter, the board of supervisors shall make an order reaffirming its conclusions as to the genuineness and sufficiency of the petition and notice hereinbefore provided for, reciting that a report regarding the proposed district has been made by the state engineer and is on file with the other records of the board, and describing the boundaries of the proposed district as

defined and established by said board. Said order shall be entered in full upon the minutes of said board. * * * (As amended, Stats. 1913, p. 996.)

Findings of board to be conclusive.

Sec. 4. A finding of the board of supervisors in favor of the genuineness and sufficiency of the petition and notice shall be final and conclusive against all persons except the State of California upon suit commenced by the attorney general. * * * (As amended, Stats. 1911, p. 139, Extra Session.)

District divisions and election of directors.

Sec. 5. If, on said final hearing, the boundaries of the proposed district are defined and established, said board shall make an order dividing said district into five divisions, as nearly equal in size as may be practicable, which shall be numbered first, second, third, fourth and fifth, * * * (As amended, Stats. 1915, p. 1368.)

Call and notice for election; ballots.

Sec. 6. Said board of supervisors shall then give notice of an election to be held in such proposed district, for the purpose of determining whether or not the same shall be organized under the provisions of this act. Such notice shall describe the boundaries so established, and shall designate a name for the proposed district, and said notice shall be published for at least three weeks previous to such election, in a newspaper published within the county in which the petition for the organization of the proposed district was presented; and if any portion of such proposed dis-

trict is within another county or counties, then such notice shall be published for the same length of time in a newspaper published in each of said counties. Such notice shall require the electors to cast ballots, which shall contain the words "Irrigation District—Yes", or "Irrigation District—No", or words equivalent thereto, and also the names of persons to be voted for at said election. For the purposes of said election the board of supervisors must establish a convenient number of election precincts in said proposed district, and define the boundaries of the same. Such election shall be conducted as nearly as practicable in accordance with the general election laws of the state, but no particular form of ballot shall be required. (Stats. 1897, p. 256.)

Elective officers.

Sec. 7. At such election there shall be elected a board of directors and an assessor, tax collector, and treasurer, * * * (Stats. 1897, p. 256.)

Qualifications of electors.

Sec. 8. No person shall be entitled to vote at any election held under the provisions of this act unless he possesses all the qualifications required of electors under the general election laws of the state. (Stats. 1897, p. 256.)

General powers and duties of directors.

Sec. 15. The board of directors shall have the power and it shall be their duty, to manage and conduct the business and affairs of the district; make and execute all necessary contracts; employ and appoint such agents, officers, and employees as may be required,

and prescribe their duties. The board and its agents and employees shall have the right to enter upon any land to make surveys, and may locate the necessary irrigation works and the line for any canal or canals, and the necessary branches for the same, on any lands which may be deemed best for such location. Said board shall also have the right to acquire, by purchase, lease, contract, condemnation, or other legal means, all lands, and waters, and water rights, and other property necessary for the construction, use, supply, maintenance, repair and improvements of said canal, or canals, and works, including canals and works constructed and being constructed by private owners, lands and reservoirs for the storage of needful waters, and all necessary appurtenances, and also, where necessary or convenient tc said ends to acquire and hold the stock of other corporations owning waters, canals, water works, franchises, concessions or rights. But no purchase or lease of any waters, or water rights, or canals or reservoirs, or reservoir sites, or irrigation works, or other property of any nature or kind, or stock in any other corporation, for any price, aggregate rental or consideration, in excess of ten thousand dollars, shall be final or binding on the district, nor shall the purchase price, rental or consideration, or any part thereof, be paid or rendered until a petition of a majority of the holders of title, or evidence of title, and of possessory rights as aforesaid, to lands within the district, such holders of title, or evidence of title, and of possessory rights, representing a majority in value of said land, according to the last equalized assessment roll of the district, if such has theretofore

been made, and if such has not been made, then according to the equalized county assessment roll covering lands of such district, shall have been filed with the board and an order of the board made thereon confirming such purchase. Said board may also construct the necessary dams, reservoirs, and works for the collection of water for said district, and do any and every lawful act necessary to be done, that sufficient water may be furnished to each landowner in said district for irrigation and domestic purposes. The said board is hereby authorized and empowered to take conveyances, leases, contracts or other assurances for all property acquired by it under the provisions of this act, in the name of such irrigation district, to and for the uses and purposes herein expressed, and to institute and maintain any and all actions and proceedings, suits at law or in equity necessary or proper in order to fully carry out the provisions of this act, or to enforce, maintain, protect or preserve any and all rights, privileges and immunities created by this act, or acquire in pursuance thereof. And in all courts, actions, suits or proceedings, the said board may sue, appear and defend in person or by attorneys, and in the name of such irrigation district. It shall be the duty of said board to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of said lands, which must be printed in convenient form for distribution in the district. Said board shall have power generally to perform all such acts as shall be necessary to fully carry out the purposes of this act. (As amended, Stats. 1911, p. 510.)

Use of water a public use.

Sec. 17. The use of all water required for the irrigation of the lands of any district formed under the provisions of this act, or the act of which this is supplementary or amendatory, and for domestic and other incidental and beneficial uses, within such district, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this act is hereby declared to be a public use, subject to the regulation and control of the state, in the manner prescribed by law. (As amended, Stats. 1911, p. 512.)

Official bonds.

Sec. 19a. Within ten days after receiving their certificates of election hereinafter provided for, said officers shall take and subscribe the official oath, and file the same in the office of the board of directors, and execute the bond hereinafter provided for. The assessor shall execute an official bond in the sum of five thousand dollars, and the collector an official bond in the sum of twenty thousand dollars, and the district treasurer an official bond in the sum of fifty thousand dollars; each of said bonds to be approved by the board of directors; provided, that the board of directors may, if it shall be deemed advisable, fix the bonds of the treasurer and collector, respectively, to suit the conditions of the district, the maximum amount of the treasurer's bond not to exceed fifty thousand dollars, and the minimum amount thereof not to be less than ten thousand dollars; and the maximum amount of the collector's bond not to exceed twenty thousand dollars,

and the minimum amount of the collector's bond not to be less than five thousand dollars. Each member of said board of directors shall execute an official bond in the sum of five thousand dollars, which said bonds shall be approved by the judge of the superior court of said county where such organization was effected, and shall be recorded in the office of the county recorder thereof, and filed with the secretary of said board. All official bonds herein provided for shall be in the form prescribed by law for the official bonds of county officers and the premiums thereon may be paid by the district; provided, that in case any district organized under this title is appointed fiscal agent of the United States or by the United States in connection with any federal reclamation project, each of said officers shall execute a further and additional official bond in such sum as the secretary of the interior may require, conditioned for the faithful discharge of the duties of his office and the faithful discharge by the district of its duties as fiscal or other agent of the United States under any such appointment or authorization, and any such bond may be sued upon by the United States or any person injured by the failure of such officer or the district to fully, promptly and completely perform their respective duties. (As amended, Stats. 1917, p. 760.)

Qualification of director.

Sec. 26. A director shall be a resident and freeholder of the irrigation district, but not necessarily of the division for which he is elected. (Stats. 1897, p. 262.)

Sec. 26. A director shall be a resident and freeholder of the irrigation district and a resident of the division which he is elected to represent. (As amended, Stats. 1917, p. 761.)

Deposit of moneys.

Sec. 27b. Notwithstanding the provisions of any other law relating to the deposit of public money, any money belonging to an irrigation district organized or existing under this act may be deposited by the treasurer or any officer of such district having legal custody of such money in any state or national bank or banks in this state, and such bank or banks are authorized to accept such deposits and to give security for the same as herein provided, * * *. (Stats. 1927, p. 188, as amended by Stats. 1929, p. 686 and Stats. 1933, p. 328.)

Recall of officers.

Sec. 28½. The holder of any elective office of any irrigation district may be removed or recalled at any time by the electors; provided he has held his office at least six months. * * * (Added, Stats. 1911, Extra Session, p. 135.)

Vesting and disposition of property.

Sec. 29. The legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district and shall be held by such district, in trust for, and is hereby dedicated and set apart to the uses and purposes set forth in this act. And said board is hereby authorized and empowered to hold, use, acquire, manage, occupy

and possess said property as herein provided. The board of directors of said district may determine by resolution duly entered upon their minutes that any property, real or personal, held by said irrigation district is no longer necessary to be retained for the uses and purposes thereof, and may thereafter sell such property. * * * (As amended, Stats. 1909, p. 1075.)

Estimate of money needed for improvements.

Sec. 30. For the purpose of constructing or purchasing necessary irrigation canals and works, and acquiring the necessary property and rights therefor, and for the purpose of acquiring waters, water rights, reservoirs, reservoir sites, and other property necessary for the purposes of said district, and otherwise carrying out the provisions of this act, the board of directors of any such district must, as soon after such district has been organized as may be practicable, and also whenever thereafter the board of directors shall find that the construction fund raised by the last previous bond issue is insufficient, or that the construction fund has been exhausted by expenditures herein authorized therefrom and it is necessary to raise additional money for said purposes, estimate and determine the amount of money necessary to be raised. For the purpose of ascertaining the amount of money necessary to be raised for such purposes, or any of them, said board shall cause such surveys, examinations, drawings and plans to be made as shall furnish the proper basis for the said estimate. All such surveys, examinations, drawings and plans, and the estimate of cost based thereon shall be made under the

direction of a competent irrigation engineer and shall be certified by him. (As amended, Stats. 1917, p. 761.)

Report submitted to Irrigation District Commission.

Sec. 30a. The board of directors shall then submit a copy of the said engineer's report to the commission authorized by law to approve bonds of irrigation districts for certification as legal investments for savings banks and for the other purposes specified in the act creating said commission. * * * (Stats. 1917, p. 762.)

Special election.

Sec. 30c. Thereafter said board when petitioned by a majority of the holders of title, or evidence of title, and of possessory rights to lands within the district, such holders of title, or evidence of title, and of such possessory rights representing a majority in value of said lands according to the equalized assessment roll of the district, if such has theretofore been made, and, if such has not been made, then according to the equalized county assessment roll covering the lands in such district, or when petitioned by not less than five hundred petitioners, each petition to the number of at least five hundred to be an elector in the district, or to be some person, corporation, association or partnership, the holder of title to land in the district or of evidence of title to land in said district, and which said petitioners signing said petition shall include the owners of not less than twenty per cent in value of the land within the irrigation district, according to the equalized county assessment roll or rolls for the year last preceding, shall immediately call a special election, at which shall be submitted to the electors of such dis-

trict possessing the qualifications prescribed by this act, the question whether or not the bonds of said district in the amount as set forth in said petition shall be issued. (As amended, Stats. 1917, p. 762.)

Life of bonds; interest; denominations.

Sec. 31. (This section at the time of the issuance of the Lindsay-Strathmore Irrigation District bonds provided that the bonds "shall be negotiable in form".) (Stats. 1913, p. 998.)

Paid by annual assessment.

Sec. 33. Said bonds and the interest thereon shall be paid from revenue derived from an annual assessment upon the land within the district; and all the land within the district shall be and remain liable to be assessed for such payments as hereinafter provided. (Stats. 1897, p. 265 and Stats. 1917, p. 764.)

Duty of assessor; improvements exempt.

Sec. 35. The assessor must, between the first Monday in March and the first Monday in June, in each year, assess all real estate in the district, to the persons who own, claim or have possession or control thereof, at its full cash value, * * *. (Stats. 1909, p. 461 and Stats. 1917, p. 764.)

Hearings on objections to assessments.

Sec. 38. (Stats. 1897, p. 267.)

Assessment for interest, principal, rentals, etc.

Sec. 39. The board of directors shall then, within fifteen days after the close of its session as a board

of equalization, levy an assessment upon the lands within the district in an amount sufficient to raise the interest due or that will become due on all outstanding bonds of the district on the first day of the next ensuing January and the first day of the next ensuing July, or that the board of directors believes will become due on either or both of said dates, on bonds authorized but not sold; also sufficient to pay the principal of all bonds of the district that have matured or that will mature before the close of the next ensuing calendar year; also sufficient to pay in full all sums due or that will become due from the district before the time for levying the next annual assessment, on account of rentals, or charges for lands, water rights acquired by said district under lease or contract; also sufficient to pay in full the amount of all unpaid warrants of the district issued in accordance with this act and the amount of any other contracts or obligation of the district which shall have been reduced to judgment; also sufficient to raise such amount not exceeding two per centum of the aggregate value of the lands within the district according to the latest duly equalized assessment roll thereof, as the board of directors shall determine may be needed to be raised by assessment for the general expenses of the district during the next ensuing calendar year. (As amended, Stats. 1917, p. 765.)

Neglect to make assessment.

Sec. 39b. If as the result of the neglect or refusal of the board of directors to cause such assessment and levies to be made as in this act provided, then the duly equalized assessment made by the county assessor of

the county or each of the respective counties in which the district is situated shall be the basis of assessment for the district, and the board of supervisors of the county in which the office of the board of directors of said district is situated shall cause an assessment roll of said district to be prepared, and shall make the levy required by this act, in the same manner and with like effect as if the same had been made by said board of directors and all expenses incident thereto shall be borne by such district and may be collected by suit at law, which shall be commenced by the district attorney of the county whose board of supervisors caused said assessment roll to be prepared, unless the amount of such expenses shall be paid within sixty days from the time when proper demand shall have been made therefor. In case of the neglect or refusal of the collector or treasurer of any irrigation district to perform the duties imposed by law, then the tax collector and the treasurer of the county in which the office of the board of directors of such district is situated must respectively perform such duties and shall be accountable therefor upon their official bonds; but, in case any county tax collector shall collect any assessment for any irrigation district, he shall pay the same to the county treasurer, who shall place such money in special fund to the credit of the district and shall disburse the same to the proper persons for the purposes for which such assessments have been levied and shall not pay any part thereof to the treasurer of said district until said county treasurer shall be satisfied that all of the valid obligations for which such assessments were levied and for which payment has been demanded have been paid. (Stats. 1917, p. 765.)

Duty of district attorney.

Sec. 39c. It shall be the duty of the district attorney of each county in which the office of any irrigation district is located to ascertain each year whether the duties relating to the levying and collection of assessments, as in this act provided, have been performed, and if he shall learn that the board of directors or any official of any such irrigation district has neglected or refused to perform any such duty, said district attorney shall so notify the board of supervisors or the county official required by this act to perform such duty in such case, and, unless such board of supervisors or such county official shall proceed to the performance of such duty within thirty days after the receipt of such notice the district attorney shall take such action in court as may be necessary to compel the performance of such duty, and said district attorney shall give such notice to other officials, and shall take such action, as may be necessary to secure the performance in their proper sequence of the other duties relating to the levying and collection of assessments, as in this act provided, that for the enforcement of the levying and collection of any assessment hereafter required to be levied and collected for the payment of any debt hereafter incurred, in case complaint shall be made to the attorney general of the State of California that the district attorney of any county has not performed any duty devolving upon him by the provisions of this section, or that he is not proceeding with due diligence or in the proper manner in the performance of any such duty, the attorney general shall made an investigation, and if it shall be found that such charge or

charges are true, said attorney general shall take such measures as may be necessary to enforce the performance of the duties relating to the levying and collection of assessments, as in this act provided. (Stats. 1917, p. 766.)

Unpaid tolls part of assessment.

Sec. 39f. Whenever any tolls and charges for the use of water have been fixed by the board of directors, it shall be lawful to make the same payable in advance, and in case any such tolls or charges remain unpaid at the time hereinbefore specified for levying the annual assessment the amount due for such tolls and charges may be added to and become a part of the assessment levied upon the land upon which the water for which such tolls or charges are unpaid was used. (Stats. 1917, p. 768.)

Assessment becomes a lien, when.

Sec. 40. The assessment upon real property is a lien against the property assessed from and after the first Monday in March for any year, and the lien for the bonds of any issue shall be a preferred lien to that for any subsequent issue, and such lien is not removed until the assessments are paid, or the property sold for the payment thereof. (Stats. 1897, p. 267.)

Tax deed evidence of what.

Sec. 48. Such deed duly acknowledged or proved is (except as against actual fraud) conclusive evidence of the regularity of all the proceedings from the assessment by the assessor, inclusive, up to the execution of the deed. The deed conveys to the grantee the absolute title to the lands described therein free of

all encumbrances, except when the land is owned by the United States, or this state, in which case it is *prima facie* evidence of the right of possession. (Stats. 1897, p. 271; Stats. 1931, p. 441.)

Redemption of bonds.

Sec. 52. Upon presentation of any matured bond or any matured interest coupon of any bond of the district, the treasurer shall pay the same from the bond fund. If funds are not available for the payment of any such matured bond or interest coupons, it shall draw interest at the rate of seven per cent per annum from the date of its presentation for payment until notice is given that funds are available for its payment, * * *. (Stats. 1919, p. 667.)

Power to incur indebtedness restricted.

Sec. 61. The board of directors or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act. * * * (Stats. 1915, p. 1369.)

Exemption of property from taxation.

Sec. 66. The rights of way, ditches, flumes, pipelines, dams, water rights, reservoirs, and other property of like character, belonging to any irrigation district shall not be taxed for state and county or municipal purposes. (Stats. 1897, p. 276.)

Funds created.

Sec. 67. The following funds are hereby created and established to which the moneys properly belonging shall be apportioned, to-wit: bond fund, construction fund, general fund. (Stats. 1897, p. 276.)

Appendix B

2. INVOLUNTARY DISSOLUTION.

An act declaring the conditions upon which an irrigation district may be dissolved, prescribing the procedure therefor, and the winding up of the affairs of the district when dissolved. Approved May 18, 1919, Statutes 1919, p. 751, Amended, Statutes 1925, p. 220.

Dissolution and disposition of property.

Sec. 3. Upon final judgment of dissolution in such action, the district in question shall be deemed dissolved and annulled. The court shall determine the amount of indebtedness outstanding against said district, including the costs of the court action herein provided for, and thereafter the appropriate county officers shall act as ex officio officers of the district; the records and papers of every kind belonging to the district shall be turned over to the proper county officers. The county treasurer shall perform the duties of the district treasurer; the county tax collector shall perform the duties of the district tax collector; the county assessor shall perform the duties of the district assessor; the county clerk shall perform the duties of the secretary of the board of directors; the board of supervisors shall perform the duties of the board of directors; they shall proceed to levy and collect such additional taxes as may be necessary upon the lands embraced within such district in the same manner and with the same procedure for non-payment that county taxes are levied and collected for the pur-

pose of paying such outstanding indebtedness not provided for by previous assessments. All property of every kind belonging to the district, including lands sold to the district for taxes, shall be sold as the court may direct and the proceeds together with all money on hand shall be used to pay off the indebtedness. All funds remaining after all outstanding indebtedness has been paid shall be apportioned and be paid to the assessment payers according to the last assessment roll. (Stats. 1919, p. 752.)

Appendix C

3. CALIFORNIA DISTRICTS SECURITIES COMMISSION ACT.

An act creating the California Districts Securities Commission, providing for its appointment, and defining its duties and powers, relating to bonds of irrigation districts, providing under what circumstances such bonds shall be legal investments for funds of banks, insurance companies and trust companies, trust funds, state school funds and any money or funds which may now or hereafter be invested in bonds of cities, cities and counties, counties, school districts or municipalities, and providing under what circumstances the use of bonds of irrigation districts as security for the performance of any act may be authorized, providing that certain districts may be declared insolvent, and providing for the administration of insolvent districts, making an appropriation, to carry out the purposes of the act, and repealing an act entitled "An act relating to bonds of irrigation districts, providing under what circumstances such bonds shall be legal investments for funds of banks, insurance companies and trust companies, trust funds, State school funds and any money or funds which may now or hereafter be invested in bonds of cities, cities and counties, counties, school districts or municipalities, and providing under what circumstances the use of bonds of irrigation districts as security for the performance of any act may be authorized," approved June 13, 1913, and as amended by Stats. 1931, p. 2263, and Stats. 1937, p. 491.

California Districts Securities Commission created—personnel—compensation.

Section 1. There is hereby created a commission to be known as and designated the California districts securities commission, which commission shall consist of five members as follows: the attorney general, the state engineer, the superintendent of banks, and two other members to be appointed by the governor, each of whom at the time of his appointment shall be one who has had at least five years actual experience in the affairs of an irrigation district in this state as an officer or employee. The terms of office of the two members appointed by the governor shall be four years from the date of their appointment, and until their successors are appointed. Each member of the board other than the attorney general, the state engineer and the superintendent of banks shall be entitled to receive as compensation as such member, ten dollars for each day while on official business of the commission and all members shall be entitled to receive his actual necessary expenses while on such official business.

Report of commission—limitation upon approval of bonds for certification.

Sec. 4. Such commission, upon receipt of a certified copy of such resolution, shall, without delay, make or cause to be made an investigation of the affairs of the district and report thereon in writing. If no bonds of the district shall have theretofore been certified as provided in this act or under the provisions of "An act relating to bonds of irrigation districts, providing under what circumstances such bonds

shall be legal investments for funds of banks, insurance companies and trust companies, trust funds, state school funds and any money or funds which may now or hereafter be invested in bonds of cities, cities and counties, counties, school districts or municipalities, and providing under what circumstances the use of bonds of irrigation districts as security for the performance of any act may be authorized." Approved June 13, 1913, or acts amendatory thereof or supplementary thereto, such report shall be made upon each and every detail that may in the opinion of the commission have any bearing upon the success or failure of the project about to be undertaken by the district, and every fact which will aid the commission in determining the feasibility and economic soundness of such project. If bonds of the district shall have theretofore been so certified then such report shall be upon the following points:

(a) The supply of water available for the project and the right of the district to so much water as may be needed.

(b) The nature of the soil as to its fertility and susceptibility to irrigation, the probable amount of water needed for its irrigation and the probable need of drainage.

(c) The feasibility of the district's irrigation system and of the specific project for which the bonds under consideration are desired or have been used, whether such system and project be constructed, projected or partially completed.

In either case the commission shall estimate the reasonable value of the water, water rights, canals, reservoirs, reservoir sites and irrigation and power works and other property owned by the district or to be acquired or constructed with the proceeds of the bonds proposed to be issued by said district and the reasonable value of lands included within the boundaries of the district.

No bond issue of any district shall be approved for certification as provided in this act which together with any other outstanding bonds of such district including bonds authorized but not sold exceeds sixty per centum of the aggregate value of the water, water rights, canals, reservoirs, reservoir sites, irrigation and power works and other property owned by the district or to be acquired or constructed with the proceeds of the bonds proposed to be issued by said district, and the reasonable value of the lands within the boundary of the district.

Certified bonds are legal investments.

Sec. 9. All bonds certified in accordance with the terms of this act shall be legal investments for all trust funds, and for the funds of all insurance companies, banks, both commercial and savings, and trust companies and for the state school funds and whenever any money or funds may, by law now or hereafter enacted, be invested in bonds of cities, cities and counties, counties, school district, or municipalities in the State of California, such money or funds may be invested in the said bonds of such districts, and whenever bonds of cities, cities and counties, counties, school

districts or municipalities may by any law now or hereafter enacted be used as security for the performance of any act, bonds of districts under the limitations in this act provided may be so used. This act is intended to be and shall be considered the latest enactment upon the matters herein contained, and any and all acts in conflict with the provisions hereof are hereby repealed.

Sec. 11 (as amended, Stats. 1937, p. 491). Whenever any district has levied the annual assessment required by the laws of this state and when the money derived from said assessment, together with any other revenue allocated to payment of bond interest and principal, is insufficient to meet the bond interest or principal when due and said district defaults on its bond principal or interest, or both, to the extent of not less than twenty per cent (20%) of the amount due, said defaulting district may become subject to this section and to the control and direction of the commission as herein provided upon the application of such district and the approval thereof by the commission. Thereafter it shall continue subject to this section and to such control and direction during the effective period of this section unless and until the amount raised by its annual assessment as hereinafter provided, together with other revenue derived from any source and shall be sufficient to meet and pay off all matured and uncanceled or unrefunded obligations of such district, bonded or otherwise, in which event it shall cease to be subject to this section and such control and direction shall terminate so long as said district does not again default as aforesaid. Upon

receipt of written notice from any such district, the California Districts Securities Commission shall make such an investigation of the affairs of the district at the expense of the district as it may deem proper and for which funds are available in order to inform itself as to the financial affairs of the district and its lands, and to enable it to carry out the provisions of this section intelligently.

The board of directors of any such defaulting district, in levying the annual assessment of the district, may, notwithstanding Section 39 of the California Irrigation District Act or any other provision of law governing such district, levy only for such total amount as in their judgment by a finding of fact, approved by the commission it will be reasonably possible for the lands in said district, taken as a whole, to pay without exceeding a delinquency of fifteen per cent. In determining the amount it is possible for the lands to pay, at the time of each annual assessment, the board of directors shall consider the productivity of lands in the district, crops growing and to be grown during the year, market conditions, as well as they can be forecast, the cost of producing and marketing crops, and obligations of the land respecting taxes and public liens. Out of the money derived from such annual assessment the board of directors of the district may set aside such sum as, in the judgment of the board, and approved by the commission, may be necessary, in addition to other revenue allocable to that purpose, for the operation and maintenance of said district and its works for the ensuing year. The balance of said money de-

rived from such annual assessment shall be prorated to bond interest, bond principal and to other outstanding obligations of the district in the proportion that the total amount due on each of said items shall bear to the said balance.

Notwithstanding anything in this section contained, in any case in which an irrigation district has heretofore defaulted or shall hereafter default in the payment of its indebtedness as in this act provided, no district shall be deemed to be or have been under the control or direction of the commission as in this section defined or under the supervision or control of the commission as to the fiscal affairs of such district until and unless the commission has or shall have made its order approving a reduced assessment.

This section shall remain in effect only until the first day of November, 1939, unless sooner repealed. The legislature expressly declares that this section is intended to be applicable to all bonds, obligations and assessments of districts which have defaulted to the extent hereinbefore set forth, and the legislature expressly declares that, except as otherwise expressly provided by law, it applies, and shall be construed to apply, to all bonds now or hereafter issued and outstanding. Nothing in this section contained, however, shall be deemed to extinguish or cancel any obligation due from any district, and whenever the annual assessment, levied as hereinbefore provided, leaves matured bond principal or interest or other matured obligations unpaid, said unpaid balance shall continue as a district obligation until paid or refunded in accordance with law.

(Sec. 2). The agricultural emergency referred to in Section 2 of Chapter 60 of the Statutes of 1933 continues to exist, and it is necessary for the same reasons that Section 11 of the act cited in the title hereof was enacted to continue the section in effect until November, 1939.

(Sec. 3). Nothing in this act contained shall be applicable to refunding bonds of any irrigation district issued under or pursuant to a plan of readjustment submitted to and confirmed by any United States District Court in any proceedings under the Federal Bankruptcy Act, as amended, or any plan of readjustment submitted to and confirmed by any court of competent jurisdiction under any law of the State of California, and such refunding bonds shall be payable, as to both principal and interest, from assessments levied and collected in accordance with the terms of said bonds and the plan of readjustment pursuant to which the same are or are to be issued, anything in this act to the contrary notwithstanding.

Appendix D

ENABLING ACT.

"An act in relation to relief from special assessments and in relation to financial relief therefrom, and of taxing districts, as defined in Chapter IX of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended, validating petitions and proceedings under or in contemplation of proceedings under, said Chapter IX, and authorizing contribution by cities and counties toward the payment of such assessments, and declaring the urgency thereof, to take effect immediately."

Section 1. For the purpose of this act a "taxing district" is hereby defined to be a "taxing district" as described in Chapter IX of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," as approved July 1, 1898, and as amended by the addition thereto of Chapter IX, approved May 24, 1934. Said act of Congress and acts amendatory and supplementary thereto, as the same may be amended from time to time, are herein referred to as the "Federal Bankruptcy Statute."

Sec. 6. No final decree or order of the United States District Court confirming a plan of readjustment shall be effective for the purpose of binding the taxing district unless and until such taxing district files with the court a certified copy of a resolution of such taxing district, adopted by it or by the officials referred to in section 2 hereof, consenting to the plan of readjustment set forth or referred to in such final decree or order.